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BOT and Exit by Dispute  
Settlement: a Vietnamese Case  
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# Summary

The BOT model is a type of concessionary arrangement that is gaining tremendous popularity in developing countries as a method of infrastructure project financing. In its most common form, a Build-Operate-Transfer (BOT) arrangement involves a developing country government that has decided to build new infrastructure and cannot afford the project or does not want to incur the liability of repaying a multilateral loan. A contract is concluded between host government and a foreign investor, where the foreign investor builds the industrial project, operates it for a set duration and then transfers it back to the government, without further compensation. Incentives for the foreign investors are expanded markets and reduced production costs. Financing is usually provided on a limited recourse basis and the income that derives from the project's operation is then used to repay the lenders.

The massive interest foreign investors have shown in Asia, Africa and Eastern Europe suggests the substantial potential of break-through markets like Vietnam. However, investors will want to proceed with caution. The decision to invest in a foreign country - especially where BOT projects are concerned, seeing as how substantial outlays of capital over a long period of time are at stake - should also be made on the basis of other factors, discussed *infra* as specific risks. Regarding the legal risk, one of the more important aspects is the way in which disputes between the host country and foreign investors are resolved.

When investors find themselves in difficulties, they will want to have a reliable exit from an investment gone wrong; in most cases, the chosen form for this is by way of dispute settlement. In the present thesis, the applicability of dispute settlement as an exit mechanism for the foreign investor in Vietnam will be examined. The different alternatives at hand for commercial parties - litigation, domestic and international arbitration, various alternative dispute resolution techniques - are accounted for in the following, with an attempt at appraising their actual usefulness in the Vietnamese context. Accepted "facts" in the field of commercial dispute settlement, such as the superiority of international arbitration over litigation, may or may not be applicable in the special commercial and legal environment that Vietnam is, considering the country's history and political policies. Since the writers had the advantage of performing a field study, a certain emphasis in respect of the practical context is generally added, in addition to the necessary descriptive and theoretical presentations.

# Preface

A great opportunity was given us, when we received the Minor Field Studies scholarship, financed by SIDA, to write our master thesis as a field study of the Vietnamese legal climate. During the course of this project, we both feel that we have gained incredibly in experience, within and outside the professional scope. For this, we are very grateful towards everyone who has helped us along the way, friendly hotel receptionists as well as expatriates; all who have taken us under their wings in a bewildering, but wonderful, environment far away from home.

We would also especially like to thank our supervisor, professor Lars Gorton, for his knowledgeable support throughout the completion of this thesis; Lars-Göran Malmberg, who was of infinite help to us during our stay in Vietnam; Erik Rydgren, President and Country Manager of ABB Vietnam and Gunnar Wenneberg, General Manager and Chief Representative LM Ericsson International AB in Vietnam.

# Abbreviations

ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
BCC	Business Co-operation Contracts
BOO	Build, Operate and Own
BOT	Build, Operate and Transfer
BOR	Build, Operate and Renewal of Concession
BOOT	Build, Own, Operate and Transfer
BLT	Build, Lease and Transfer
BRT	Build, Rent and Transfer
BT	Build and Transfer
BTO	Build, Transfer and Operate
DBFO	Design, Build, Finance and Operate
DCMF	Design, Construct, Manage and Finance.
EAC	Economic Arbitration Center
EFOC	Enterprise with 100% Foreign-owned Capital
FDI	Foreign Direct Investment
FIE	Foreign Investment Enterprises
FIL	Foreign Investment Law
MOT	Modernize, Own/Operate and Transfer
PPP	Public Private Partnerships
ROO	Rehabilitate, Own and Transfer
ROT	Rehabilitate, Own and Transfer
SCCI	State Committee for Co-operation and Investment
SIDA	Swedish International Development Co-operation Agency
UNIDO	Guidelines for development, negotiation and contracting of BOT projects
UNCITRAL	United Nations Commission on International Trade Law
VIAC	Vietnam International Arbitration Center
VND	Vietnamese Dong
VPC	Vietnamese Communist Party
WTO	World Trade Organisation



# 1 Introduction

## 1.1 Purpose and Posing of Problem

This thesis is intended to give an overview of the law, regulations, risks and procedures that are relevant when investing in Vietnam – an emerging market. The chief purpose – and the issue most in-depth researched in the following - is to look at the dispute resolution situation, where the parties involved are, on one side, a foreign investor and, on the other side, a state party. The fact that there is a specific setting for the study comprised in this thesis, i.e. the Socialist Republic of Vietnam, adds a further dimension to the question to be examined: is it possible to safely settle a commercial dispute, from a legal security point of view, in a political environment such as that of Vietnam? Especially when the government holds one side of the trench, this may be an understandable source of anxiety for the foreign investor. In other words, can the means for commercial dispute settlement in the typical up-and-coming investment host state be relied on as adequate? This problem is brought to its head when dispute settlement is considered in a BOT context.

In order to give the necessary background for answering this question, basic information on the Vietnamese legal and administrative systems is provided. For a specific case study such as the present, it may be held to be of some importance to have a more complete frame of reference for the matters discussed.

For the same reason, the most essential features of the BOT construction are provided, considering how the BOT concept more or less still is in its initial state. Since the focus of the thesis in a broad sense is on viable legal conditions for foreign investment, the most significant influences on the foreign investor, which modify and determine the commercial process of decision when establishing a business abroad, are accounted for, such as the possible forms for organising the venture and typical risks to be considered.

## 1.2 Method and Material

A socialistic legal system in an authoritarian political state is difficult to research effectively. The regime releases little information and allows limited access for scholars or researchers. Therefore, although the basis for this thesis should really be a field study, its form is primarily determined by the traditional dogmatic legal method, though combining the descriptive and analytical part of the study of available legal sources. Theoretical information on, for instance, administrative procedure, was necessarily collected mainly via conventional sources, such as articles and books, instead of on location. Moreover, interviews were made with key persons in

foreign investment firms already established in Vietnam, such as Ericsson and ABB.

In order to facilitate for the reader to acquire an adequate notion for the present text, we have chosen to incorporate a running analysis where appropriate, so as to avoid tedious repetition in the concluding chapter and the excessive turning of pages forward and backward. However, in the majority of chapters, concluding remarks are given on the salient points in that section, where some inferences are made.

Where appropriate and needed, digressions will be made into subjects that may not be strictly relevant to the subject of BOT and/or commercial dispute settlement. As was mentioned above, these brief insights aim to provide for the reader a greater perspective, a context for the principal matters discussed. First and foremost, this is important because specific knowledge about the country of Vietnam and the Vietnamese system, and then not just concerning the legal aspect of it, is essential for a proper understanding of the complexities involved when doing business in Vietnam.

The material used is eclectically gathered from various sources of information; apart from the literature, law journals and interviews already mentioned, relevant Vietnamese legislation and informal interviews with local businesspeople are also important sources.

Certain delimitations are made to narrow down the already rather wide scope of the presentation. In the BOT context, the accounting aspect is not brought up. On a brief note, it might be mentioned that the Vietnamese accounting system does not always equate to commonly accepted international principles of accounting. Much is generally held to be desired within this area. Banking, taxation and security issues are also excluded; although a comprehensive study of these subjects doubtlessly would be of great merit to the foreign investor, neither of the authors possess the special knowledge necessary for the task. Besides, the volume of the present thesis would increase indefinitely, should an attempt at an all-inclusive guide for the foreign investor to the Vietnamese market be made.

It is, then, to be noted, that this essay is written with the point of view of the prospective investor in mind. For instance, risks and advantages as regards the BOT model are described from a commercial angle. Certainly, another perspective could be adopted, where the present issues could be treated from, e.g., the host government's side. No doubt a rather different picture would then be painted; hints as to this effect has been presented in the doctrine. However, these aspects will not be further expanded upon here, where the scope is broad as it is, although they would probably make up an excellent basis for an essay on their own accord.

## 1.3 An Outline

The thesis is divided into eight chapters, chapter six being the main part, and also the operative part as far as the discussion on salient features of the means for commercial dispute settlement in Vietnam is concerned.

Chapter one gives an introduction to the Vietnamese setting, with an historical sketch and an outline of the administrative system, while chapter two introduces the Vietnamese legal system and its fundamental ideologies. The main legislations concerned in the thesis are also presented.

In chapter three, the different forms of establishment on a foreign market and their merits, and demerits, are discussed. Regarding the representative office and the joint venture, which are the two forms that have been most frequently employed in Vietnam, information gathered in interviews with representatives for Ericsson and ABB is imparted.

Chapter four considers the BOT vehicle. Amongst other features, its structure, the parties involved and the different agreements comprised are elucidated. The BOT situation in Vietnam is also expounded.

Chapter five states some of the risks that have to be taken into consideration when investing in a foreign market. The focus is on risks that are particularly present in an emerging market, such as Vietnam.

The principal part of the thesis is to be found in chapter six. There, the subject of commercial dispute settlement in Vietnam, also specifically in a BOT context, is commented upon. Both litigation and arbitration aspects are accounted for.

Chapter seven presents prospect reforms for the legal development in Vietnam and also attempts to set up some future aims for foreign direct investment on the Vietnamese market. In chapter eight, summarized conclusions that may be inferred from the discussions in earlier chapters are offered.

## 1.4 In General - Background

Since the 1970s, a vast amount of foreign funding - from both private business and public programmes such as international aid - has gone into investments in South East Asia, enabling projects essential for the economic development agendas of these governments to proceed. Stable and just legal systems play an important role within the framework of international development assistance. It is one of the functions of law to control, regulate and order these and related activities. Quite often, as it turns out, it does not. The reason is partly that the decolonised legal system is dysfunctional and partly that the new 'special' laws introduced supposedly for the benefit of

Western investors have little or no actual substance; they are fundamentally unworkable. One explanation for this is the tension between the need to encourage foreign investment to fund economic growth on one hand, and on the other hand, domestic pressure to protect local business interests, often tied to political elites, a polarization of interests that is very much present in, for instance, Vietnamese commercial life. The consequence of this is that access to localized legal and accounting services for supporting complex transactions often is artificially constrained.<sup>1</sup>

Another reason why legal resources in South East Asia generally, or Vietnam specifically, are not working in the way that perhaps would be expected from the point of view of the foreign investor, is that the models for new commercial laws and legal institutions are foreign or mixed in origin. Western states such as the US, Australia and the countries of the EU are competing for influence and leverage in the process of building and rebuilding the legal infrastructure in the South East Asian countries.

Much of the aid provided for legal infrastructure development is predicated on the idea that the new commercial law and legal institutions will be modelled after a Western scheme and will be, therefore, transparent and familiar to Western investors and trade partners.<sup>2</sup> This is a very naïve presupposition, which overlooks the importance of domestic legal traditions, whether or not those cover the area of law at hand, as well as the complexity of borrowings and adaptations often already present, seeing as how many of the countries are former colonial states. There is also the ineligious influence of Asian role models such as Singapore and Japan, as far as sources of legal and bureaucratic models are concerned.<sup>3</sup> The practice communicated by a western-style piece of legislature may also seem simply lacking in the respect of an innate sense of legality; it is simply not congruous with the legal system and traditions already present, and therefore there is no surrounding structure sustaining or enforcing it.

In Vietnam, for example, where the political and legal systems are dominated by the executive and its bureaucracy, statutes, in theory of superior rank in the legal hierarchy, are subordinate to a mass of executive and bureaucratic practices, written and unwritten. The government approach to law is a positivist one, in the sense that law is being created not so much to support commerce and regulate actual commercial practices, but to satisfy demands of foreign investors, financiers and governments. The 'real' law is to be found not in the primary legal sources, but in decrees, guidelines, circulars, letters and day-to-day decisions of the government departments, a pattern typical for developing, and especially socialist, legal systems throughout the region. This pattern also tends to create corruption, lack of

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<sup>1</sup> Pyles, A., *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 8.

<sup>2</sup> *Ibid.*, p. 8.

<sup>3</sup> *Ibid.*, p. 9.

legal security (rule of law) and dysfunction in general - so-called 'alternative rule' systems.<sup>4</sup>

## 1.5 Political History

Vietnam has a unique and rich civilisation and a highly cultured people, but there is no doubt that its long history of war is notorious and continues to weigh heavily on the consciousness of all who can remember. Today, Vietnam is a country at peace, but the hundreds of years of fiercely protecting their independence and sovereignty against conquerors or 'rescuers' still remain in the people's souls and is a legacy that they are proud of and will remember forever.<sup>5</sup>

### 1.5.1 Franco-Viet Minh War

The Communist Party was founded in 1930 by Ho Chi Minh and offered a successful resistance to the French through Viet Minh, a nationalistic popular front. After declaring independence from the French colonialisation in 1945, Ho Chi Minh proclaimed the independent Democratic Republic of Vietnam. However, the French attempted to re-establish the colonial rule and this led to another war in 1946, which Viet Minh won in 1954.

After the war, the North of Vietnam became the Democratic Republic of Vietnam and adopted a highly centralized legal system with a communistic, Soviet-style, command economy. Land and industry were brought under public ownership and the country was divided in North and South, as a result of the Geneva Convention. The South was ruled as a republic, by a government led by Ngo Dinh Diem, a ferociously anticommunist Catholic, who was supported by the USA. His repressive policies led to a campaign, from the North, to liberate the South from the Diem regime.

### 1.5.2 The North - South War

In April 1960, universal military conscription was implemented in the North and Hanoi announced the formation of the National Liberation Front (NFL), which later came to be known as the Viet Cong or just as the VC.<sup>6</sup> Ngo Dinh Diem was killed and overthrown in 1963 by a military coup supported by the Americans, since his cruel regime had become too inconvenient for

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<sup>4</sup> *Ibid*, p. 10.

<sup>5</sup> The history information is gathered from guided tours at the Ho Chi Minh Mausoleum Complex, Ho Chi Minh Museum and Stilt House and the Presidential Palace in Hanoi, Vietnam, 041007 and from the documentaries 'Vietnam, Vietnam – The Next Generation', Canada, 2003, SVT 2, kl.20.00, 050430 and 'The fall of Saigon', America, SVT 2, kl.21.15, 050430.

<sup>6</sup> 'Viet Cong' and 'VC' are both abbreviations for Viet Nam Cong Sam which means Vietnamese Communist.

the US. A year later Hanoi began infiltrating regular North Vietnamese Army (NVA) units into the South. The Army of the Republic of Vietnam (ARVN) could not manage defending the South, due to the widespread desertion and corruption. It was at this point that the US committed its first combat troops and their objective was to lead the worldwide struggle against communism and to stop its expansion. The beginning of their 'war of liberation' against the 'evil disease' of communism in the North of Vietnam commenced.<sup>7</sup>

### 1.5.3 The American War

It is beyond the scope of this thesis to describe the vicious and dirty turns and events of the American presence in Vietnam. The US heavily supported the South with financial aid and military supplies. Australia, New Zealand, South Korea, the Philippines and Thailand joined the USA forces, as a part of what the Americans called the Free World Military Forces. The North and the VC relied on the Soviet Union and China as their allies. Approximately four million civilians were injured or killed during the war, many of them in the North as part of the US bombings. The bombings of North Vietnam finally ceased in 1973, the POWs were released, and all the US military personnel left the country. 223.748 South Vietnamese Soldiers had been killed in action and the North Vietnamese and VC fatalities have been estimated at one million.<sup>8</sup>

After the retreat of the US from South Vietnam, after more than 30 years of war, Vietnam was reunified as one country in 1975, i.e. the Socialist Republic of Vietnam. The Vietnamese government started a trade cooperation with the Soviet Union and relied heavily on its financial aid. After the collapse of the Soviet Union, the aid and cooperation vanished between the countries.<sup>9</sup> Vietnam's centrally planned economy was an ineffective central bureaucracy vehicle that resulted in a shortage of goods, an uneducated labour force and substantially decreased financing possibilities. This bureaucracy in combination with the lack of development aid from the Western countries and the American trade embargo completely drained the Vietnamese economy. Vietnam did not have the financial and technological capital to exploit its own resources and develop its market economy and the country was forced to seek other sources of funding, i.e. foreign direct investment (FDI).<sup>10</sup>

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<sup>7</sup> History information from the Army Museum and The Hoa Lo Prison Museum in Hanoi, Vietnam, 041010 and the History Museum of Ho Chi Minh City 041214.

<sup>8</sup> History information from the Army Museum and The Hoa Lo Prison Museum in Hanoi, Vietnam, 041010 and the History Museum of Ho Chi Minh City, 041214.

<sup>9</sup> Matarazzi, M, 'Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and gas Industry under the 1995 Land Law', North Western Journal of International Law and Business, 1999, p.1.

<sup>10</sup> As a matter of fact, Sweden was the first Western country, in 1969, to establish diplomatic relations with Hanoi. Since then, most Western nations have followed suit.

## 1.6 The Doi Moi Reform Policy

Vietnam's former economic philosophy did not conform to the market globalization. To combine the fundamental socialist principle of public ownership with a market economy that consists of private ownership and free transferability is a complex task. There was a substantial political pressure from countries worldwide on the government to liberalize Vietnam's economy. Therefore, in 1986, after the Sixth Communist Party Congress, the Vietnamese government instituted an open-door economic policy known as the *Doi Moi*. The *Doi Moi* was intended to revitalize the economy and provide a model for economic growth. The goal was 'a market economy with a socialist direction'.<sup>11</sup> Vietnam's role model appears to have been China, where economic change combined with harsh political and legal control seems to be at least partially successful in reviving the economy.<sup>12</sup> In general, the *Doi Moi* had two components: domestic structural reforms, from macro to micro, and an open policy that promotes international trade and investment.<sup>13</sup> As a natural consequence of the *Doi Moi*, the state started to retreat from its role as a major owner and manager of enterprises. Since the introduction, price controls have been lifted, private enterprises have been created and foreign investment policies have been developed to attract foreign capital.<sup>14</sup>

In 1991, the Seventh Communist Party Congress expanded the *Doi Moi* to encompass legal reform. The new Constitution was promulgated in 1992 and it further affirmed the government's commitment to shift to an open market-oriented economic system. The Constitution recognised the right of the state, cooperatives and individuals to own and transfer property including the right to own land.<sup>15</sup> The Vietnamese government welcomes international legal co-operation to further develop the legal framework, particularly in the areas of trade and investment law.

## 1.7 Governmental Administration

Vietnam is a one-party state - since there is only one party allowed - and the party at its head is The Vietnamese Communist Party (VPC). VPC congresses are held every four to five years and the basic policies for Vietnam's economic and political direction are established on these occasions.

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<sup>11</sup> Matarazzi, M., 'Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and gas Industry under the 1995 Land Law', *North Western Journal of International Law and Business*, 1999, p. 2.

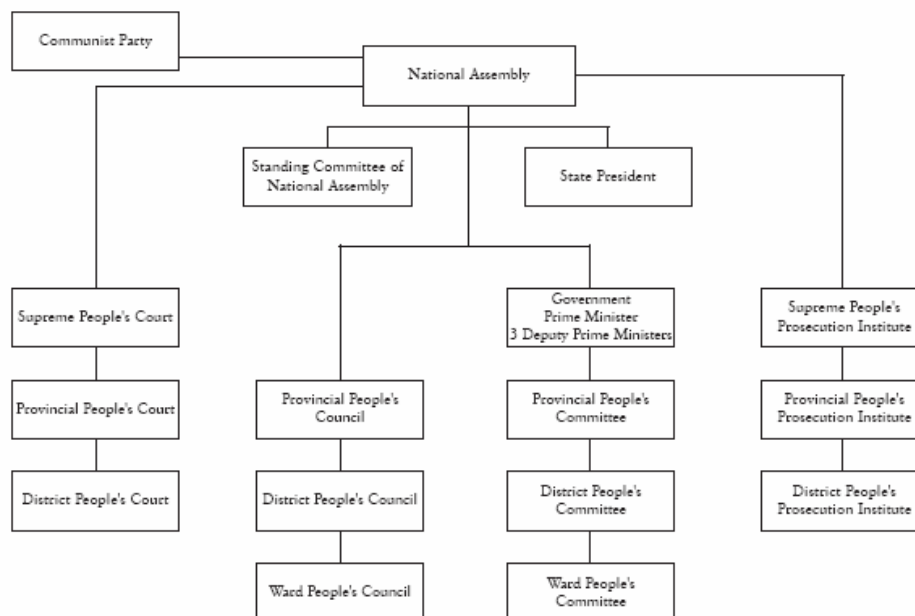
<sup>12</sup> Rose, C.V., 'The New Law and Development Movement in the Post-cold War Era: A Vietnamese Case Study', *Law and Society Review*, 1998, p.3.

<sup>13</sup> Binh, T.N. and Chi, D.P., "*The Vietnamese Economy – awakening the dormant dragon*", RoutledgeCurzon, Taylor & Francis Group, 2003, p. 105.

<sup>14</sup> *Ibid*, p. 36-37.

<sup>15</sup> Winter, N. H.(ed), *How free are the Southeast Asian Markets*, Centre for South East Asian Studies, Åbo, Akademi University Press, 1994, p.184.

## The Institutions



The National Assembly is the highest legislative organ and it is elected by the people in contested elections. The National Assembly and the People's Courts are not separate and independent bodies of the national government structure as is seen in any Western democratic country, something that may seem very strange, and probably slightly frightening, to the potential foreign investor. Much of the monitoring role of this body has now been delegated to the Standing Committee of the National Assembly. The Standing Committee of the National Assembly issues ordinances and presents draft laws to the National Assembly. The National Assembly is the only institution that has both legislative and constitutional power. It has supreme power and appoints the President, the Prime Minister, the Chief Justice of the People's Supreme Court, and the Chief of the People's Prosecution Institution.

Within the National Assembly is a cabinet-style body constituting the 'Government'. It is this government, which is the foreign investors counterpart when negotiating and contracting about domestic infrastructure needs and forthcoming BOT-projects. The government is headed by a prime minister who has the authority to run the government, select the cabinet members and has veto power over laws and regulations adopted.

The most significant ministry where foreign investors are concerned is the Ministry of Planning and Investment, because of its role in licensing larger-scale foreign investment and monitor role in relation to foreign investment activities. It also issues decisions, directions and circulars in carrying out its state management function.<sup>16</sup>

<sup>16</sup> See FIL 2000 Article 56 in Appendix A.



## 2 The Legal System in Vietnam

### 2.1 Introduction

The legal structure before the *Doi Moi* was exceptionally weak and created solely for the purposes of the VPCs domination and control. The legal system in Vietnam was based on Communist legal theory and the French civil law system. The Ministry of Justice and the College of Law was dismantled and abolished in 1960 and the executive bodies were controlled by the Communist Party. The regulatory principles rested on the rule of the decrees rather than by legislation.<sup>17</sup> During the American war, the South of Vietnam became heavily influenced by the US and their common law view on legal traditions. The US presence supplemented the already existing French legal system. In addition to the European and American influences, Vietnam has a history closely attached to the Chinese culture and Confucianism. This impact still remains, e.g. in Vietnam's strong penal orientation and the emphasis on the authority of the state.<sup>18</sup>

The *Doi Moi* and the 1992 Constitution have resulted in a series of legal reforms and an ambitious law-making programme. The strengthening of institutions, that are to act in a transparent and more predictable manner, goes hand in hand with the reform of the legal and regulatory environment. The government initiated a new commercial legal system along with a new civil code. These reforms have given foreign companies a substantial degree of confidence in Vietnam's emerging market and business climate. However, the legal system is expected to serve a dual function, both maintaining the one party-political structure and promoting economic liberalization.<sup>19</sup>

### 2.2 The Regulatory Ideologies

The legal system in Vietnam is grounded in two fundamental ideological approaches, i.e. state positivism and legal formalism. The attitude of state positivism is to treat law as rooted solely in the authority of the state and its purpose is seen as serving the interests of the socialist state. Since the ideology of Marx pervades the Vietnamese society, the interest of the state equals the interest of the working class. The communist perspective rejects any form of natural law, the rights of man and legal pluralism. At the end of the day, law is about command and control. The legal formalism approach is a by-product of state positivism. Law is seen as a formal hierarchy of

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<sup>17</sup> Beckman, B., *et al*, *Vietnam – Reform and Transformation*, Center for Pacific Asia Studies, Stockholm, 1997, p.142.

<sup>18</sup> Rose, C.V., 'The New Law and Development Movement in the Post-cold War Era: A Vietnamese Case Study', *Law and Society Review*, 1998, p.2.

<sup>19</sup> *Ibid*, p.1.

sources of authority and the state wishes to control all the actors of the playing-field. The legal text is treated as a normative instrument and is therefore considered as self-executing. This approach tends to totally neglect interpretation and implementation of the legal text. The principal goal of this system is to make sure that the sovereign authority is obeyed. The role and function of the judiciary is to ‘explain’ the correct meaning of the legal text.<sup>20</sup>

To understand how the Vietnamese legal system interacts with the community, it is necessary to comprehend that the role of the law in Vietnam is not to be liberating, but constraining and maintaining state control. The highly collective culture also results in a time-consuming decision-making processes, which makes it important for foreigners to remain patient, have economic strength and a high tolerance-level when investing and dealing with the legislative authorities in Vietnam.

## 2.3 The Legislative Hierarchy

The Constitution is the source of government and legislative authority. Vietnamese legislation is issued in the following terms<sup>21</sup>.

- Codes and laws adopted by the National Assembly are the highest form of legislative authority.
- Ordinances are passed by the Standing Committee of the National Assembly when the National Assembly is not in session.
- Decrees issued by the Government which are typically accompanied by more detailed Regulations, Circulars and Decisions which are issued by individual ministries or ministry-level bodies such as the Ministry of Finance or Ministry of Commerce.
- Guidelines are policy pronouncements or Directives issued by the Prime Minister

What makes things somewhat ambiguous is that the Constitution does not provide a hierarchy of legislative instruments. It is not easy to interpret decisions, ordinances, directives, circulars and regulations when it is hard to gain a thorough understanding of the importance of the piece of legislation in question. The National Assembly tried to solve the problem by passing the Law on Jurisdiction and Order of Promulgation of Legal Documents, which creates such a hierarchy with the intention of being a guide in the commercial community. However, a functioning legal hierarchy is far from being fully implemented among practitioners, and the law remains an artificially existing product.

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<sup>20</sup> Beckman, B., *et al*, *Vietnam – Reform and Transformation*, Center for Pacific Asia Studies, Stockholm, 1997, p.150 – 151.

<sup>21</sup> Binh, T.N. and Chi, D. P., “*The Vietnamese Economy – awakening the dormant dragon*”, RoutledgeCurzon, Taylor & Francis Group, 2003, p.183.

## 2.4 Business-related Laws

The laws associated with an investment dictate how much control a foreign investor will have over their operations. The Vietnamese government has created an investment environment relying on investment licensing, foreign exchange controls, import and export controls, tax incentives and restrictions on land ownership. These regulations are intended to maximize the benefit received from foreign investment while seeking to minimize the alleged disadvantages. As a general rule, foreign investors may invest in any area of the economy, except those relating to national security and defence. From time to time, the government may prohibit certain specific types of activities. However, in reality, investment is particularly encouraged, e.g. by tax incentives, in those areas which will aid the economy and has been nominated as being especially important. Infrastructure projects and other important industrial facilities are included in these areas.

### 2.4.1 Constitutional Protection of Foreign Investment

The 1992 Constitution of Vietnam was amended in 2001 and stipulates a constitutional protection for foreign investors and their investments in Vietnam. The government encourages foreign organisations and individuals to invest funds and technology and guarantees that the invested capital will not be subject to any governmental nationalisation. However, the State may requisite or purchase the assets with compensation if it is necessary on the account of national interests, security or defence.<sup>22</sup> The Constitution also provides that all business enterprises, whether they are foreign or local, are equal before the Vietnamese law and that the legal ownership of the capital and assets is under the protection of the authorities.<sup>23</sup>

### 2.4.2 The Civil Code and the Commercial Law

In October 1995, the National Assembly promulgated Vietnam's first civil code and it came into effect on 1 July 1996. The areas covered by the Civil Code are wide-ranging, and include guidance on matters such as protection on personal freedoms, statute of limitation, principles of ownership and protection of property rights, principles of performance of civil contracts, intellectual property rights and technology transfer. In addition to the Civil Code, a Commercial Law was passed in May 1997. It has a wide scope, covering many aspects of buying and selling goods in Vietnam and covers areas such as franchising, leasing, commercial brokerage, use of bills of exchange and agencies for the purchase and sale of goods.

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<sup>22</sup> The 1992 Constitution, Article 23 and 25.

<sup>23</sup> The 1992 Constitution, Article 22.

### 2.4.3 The Foreign Investment Law

The foreign investment regulations in Vietnam have been the subject of active reform by the Vietnamese authorities for a number of years. Promulgated by the National Assembly in 1987, the first Law on Foreign Investment<sup>24</sup> provided the basic framework for all foreign business activity and it was the first step towards legal reform. Simultaneously, the National Assembly created a separate governmental body, the State Committee for Cooperation and Investment (SCCI) to administer its provisions and review applications and grant licenses in accordance with the new law. It was amended in 1990, 1992<sup>25</sup>, 1996 and most recently in 2000.<sup>26</sup> Since its inception, the FIL 2000 has been successful in attracting investors, but the remaining legal and financial risks are still making investing on the Vietnamese market seem somewhat daunting. Notwithstanding, the regulation is considered to be ‘one of the most liberal foreign investment codes of any developing nation in the world, let alone in South East Asia’.<sup>27</sup>

The FIL 2000 provides good faith assurance by the Vietnamese government, that it is committed to market liberalisation. It states in Article 1:

‘The State shall guarantee the ownership of the invested capital and other rights of the foreign investors, and extend to the latter favourable conditions and easy formalities.’

This statement legalized private ownership of property and guaranteed aid from the government in the development of private industries. The Act sets out the basic structure for foreign investors’ businesses conducted in the country. The FIL 2000 has dual objectives. The intention of the drafting committee was to increase the economic cooperation with foreign countries, to expand the domestic development and efficient exploiting of natural and human resources.<sup>28</sup> The law tries to combine this openness while maintaining the government’s role as a regulator and supervisor of the economy and industry through active monitoring and licensing procedures. Foreign investors reacted positively to the FIL’s implementation and the FDI in Vietnam was immediately boosted.<sup>29</sup>

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<sup>24</sup> Hereinafter FIL 2000.

<sup>25</sup> The 1992 amendments to the FIL provided a legal basis for the Vietnamese private sector to establish joint ventures with foreigners. However, it does not apply to branches to foreign companies in Vietnam, see further Nguyen, T, ‘New Foreign Investment Law Implementing Regulations’, East Asian Executive Reports”, 1997, p.1.

<sup>26</sup> The FIL 2000 and its amendments and supplements are further detailed and guided to in government Decree No24/2000/ND-CP enacted on 31 July 2000.

<sup>27</sup> [http://www.china-asean.net/biz/vietnam/laws\\_regulation/vlawincentives.html](http://www.china-asean.net/biz/vietnam/laws_regulation/vlawincentives.html), 040916, 15.40, ‘Incentives for Foreign Investment’, p.1.

<sup>28</sup> See The Foreign Investment Act, paragraph 1.

<sup>29</sup> Binh, T. Nam and Chi, D.P., *The Vietnamese Economy – Awakening the Dormant Dragon*, RoutledgeCurzon, Taylor & Francis Group, 2003, p.115.

## 2.5 Concluding Remarks

It is extremely difficult to predict how authorities and judges in Vietnam will interpret and apply new and untested laws. Where there is no formally enacted law regulating an activity within the finance and business sector, it is common practice for lawmakers to apply other legislation by analogy. For example, there is no Vietnamese legislation directly regulating the ownership of commercial structures. Law assessors and professional judges are permitted by law to rule on both questions of rules and of facts. As will be further discussed *infra*, commercial disputes do happen from time to time, and the fairness of the court system is a major concern of foreign investors.

There still exists significant gaps in the fundamental knowledge, even among the most influential actors in the Vietnamese legal system. This lack of experience is due to the fact that the faculties of law were closed for long periods during the most recent “war of liberation”. The Ministry of Justice was only refounded in the early 1990s and the law in general suffered from devaluation during the war.

As business laws are not always applied or are constantly changing, the volatile and unpredictable legal framework adds more uncertainty to the investment environment. Vietnamese authorities are constantly balancing between the socialistic and capitalistic ideology and approach. Foreign companies and their employees need a large portion of patience, empathy and flexibility in order to navigate efficiently through the regulatory framework. Nevertheless, government officials have shown an openness and willingness to accommodate and adjust to the needs and expectations of foreign businesses.<sup>30</sup>

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<sup>30</sup> Interview with Mr. Gunnar Wenneberg, General Manager, Ericsson Vietnam, 041015.

## 3 Establishment in Vietnam

### 3.1 Introduction

A physical presence in Vietnam is vital in order to preserve and monitor the progress of the investments. This can be achieved through various forms, some of which overlap. In the present, Vietnam and its FIL is permitting investment through business co-operation contracts, joint ventures and even wholly foreign-owned enterprise. Foreign companies are also allowed to establish a physical presence through branches and representatives offices. The FIL 2000 dictates the financial and legal characteristics of each business and investment form that the investor can use. Most importantly and relevant for this thesis is that the Vietnamese government have opened up the domestic infrastructure market and allows projects through the BOT, BTO and BT vehicles.

### 3.2 Representative Offices

A representation office is currently the easiest and least expensive way for a foreign company to establish a presence in Vietnam. This method of conducting business on a foreign market is not *de facto* an investment in that market; rather, the representation office is to be considered a preliminary investment, a half-way commitment prior to an actual investment, allowing foreign investors to research the Vietnamese market, establish relationships with government ministries and potential domestic partners, promote and support activities of the company's head office and negotiate prospective projects. Representation offices are not allowed to conduct business, as they are not independent commercial entities. Thus, the establishment of a representation office on a foreign market qualifies as an indirect form of foreign investment.<sup>31</sup>

As is the case with all alternatives for initializing commercial activity on a foreign market, there are both positive and negative sides to the representation office. The most obvious advantage is perhaps that no initial capital investment is required. As is mentioned *supra*, the representation office also provides excellent opportunities for studying local conditions and performing a risk analysis, before any real investment is made. It is simply a well-suited start-up presence for most business sectors, but also enables follow-up on the implementation of contracts with Vietnamese organisations.

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<sup>31</sup> See Genovese, M., 'Succeeding in Vietnam's Emerging Market Economy', 1995, 17 No. 5 E. Asian Executive Rep. 7, p. 21-22 and Schot, A. C., *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, London, p. 10-11.

Establishment in the form of a representation office allows for a great measure of independent operation. In the case of Vietnam, the only amount of government regulation and supervision with regard to representative offices is the requirement for submission of six-month reports with the Ministry of Trade to outlining the activities and compliance with various Vietnamese laws that may be applicable. This allows the representative office to explore various opportunities for investment and trade in whatever area desired, without limitation, even if it has no prior experience in that specific area. Again, it is to be noted that a representation office is not a form of investment. Investments proper are more strictly regulated and supervised; the investment or business licence sets forth which activities are authorized, in some detail.

There are a few limitations, comparatively, to establishing an enterprise abroad in the initial form of a representation office. The disadvantages given below consider the Vietnamese situation in particular, but may nonetheless be applicable on a more general level also. Firstly, the representation office may only carry out the activities given in its license. There is also a restriction on the number of foreign staff members that a representation office may employ, and local staff must be hired through a state-owned service company, although there are some situations that are exempted from this restriction and staff may be hired directly. Another drawback is that operating expenses normally are relatively high, due to the considerable costs of labour and office space. It is important to mirror the cost aspect with the input generated by the representation office in question; often, there are not enough activities to justify the expense of maintaining a representation office for more than a limited period of time. Even if business prospects present themselves, the representation office as an independent entity cannot generate a direct income within Vietnam.

Foreign companies interested in setting up a representative office in Vietnam must adhere to the Regulations on the Establishments and Operation of Representative Offices of Foreign Economic Organisations in Vietnam of August 2, 1994. The Regulations state that the foreign company in question must:

- be established in accordance with the laws of the country of its origin;
- have been in operation for at least five years; and
- have investment projects that feasibly will increase Vietnam's economic and commercial development and in which Vietnamese parties are interested.

The application for the establishment of a representation office should, along with the formal application form, comprise letters of interest, memoranda of understanding, or the investment licence, if a licence of investment or business has already been obtained from the State Committee for Cooperation and Investment (SCCI). The Ministry of Trade will then, on the basis of the submitted documents, decide whether Vietnamese parties

are likely to be interested in starting up investment or trade projects with the applicant.

As is apparent from the above, the Ministry of Trade is responsible for reviewing applications for representative offices and issuing representative office licences. Circular 03/TM-PC of the Ministry of Trade, of February 10, 1995<sup>32</sup> sets forth the correct procedures for applying for a representation office. If the application is approved, the Ministry issues a license for the establishment of a representation office. The maximum time limit granted in the license is three years, a time period that may be extended by the submission of an application at least 30 days before the current license expires.

It should be noted that several other ministries also issue representative office licenses, depending on which sector the applicant belongs to. For instance, the State Bank of Vietnam handles applications for representation offices for banks and credit organisations. In January of 1995, the Ministry of Justice assumed jurisdiction over issuing representative office licenses to foreign law firms from the Ministry of Trade.

### 3.2.1 The Case of Ericsson<sup>33</sup>

#### 3.2.1.1 Initial Contact

The Vietnamese Ministry of Telecommunications first contacted Ericsson, on account of ordering telephone switches for the landline, in the beginning of the 1990's, Vietnam having been open for private business activities only since 1988-89, after many years of domestic political turmoil. This change in the Vietnamese outlook was brought about by the *Doi Moi* economic renovation, adopted by the Communist Party on the Sixth Party Congress in late 1986, the implications of which are discussed more in-depth *supra*.

In 1993, Ericsson established its first representation office in Hanoi. Mr Wenneberg is of the experience that to be commercially centred in Hanoi affords many important advantages. The Vietnamese government is located in Hanoi, along with all its Ministries and most head offices of the larger State Owned Enterprises (SOEs). In short, Hanoi is where the major decisions are made. Ho Chi Minh City, on the other hand, is the appropriate location for consumer-based commercial activities. Today, the Hanoi Ericsson representative office employs approximately 70 members of staff, as compared to just seven employees (in 1995).

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<sup>32</sup> Circular Guiding the Implementation of the Regulations on the Establishment and Operation of Representation Offices of Foreign Economic Organisations in Vietnam

<sup>33</sup> Interview with Mr. Gunnar Wenneberg, General Manager, Ericsson Vietnam, 041015.



### 3.2.1.2 Ericsson in Vietnam

Ericsson's commitment in Vietnam is definitely long-term, according to Mr Wenneberg. During the first years of the nineties, when Ericsson first entered the Vietnamese market, there were 50 000 telephone connections in the whole of the country, as opposed to five million today. Though, the telephone density still is only five percent, whereas 25 percent is the average international figure.

In Vietnam, Ericsson supplies landline telephone switches to 15 provinces (of 61). Ericsson is also the supplier of all mobile-phone infrastructure to the three operators on the Vietnamese market. Despite this major presence on Ericsson's part in Vietnam, Ericsson has chosen not to manufacture in Vietnam, although certain propositions in this direction were made from the Vietnamese government, due to burgeoning opportunities for establishing an industrial platform in China at the time. Also in later years, Ericsson has chosen to conduct its business on the Vietnamese market through its Hanoi representation office, due to governmental regulations regarding the telecom industry, stating that manufacturing activities, as far as foreign companies are concerned, are allowed only in a 50-50 joint venture with a Vietnamese partner, which is to be appointed by the government. WTO accession would automatically force the Vietnamese government to mitigate this restriction, so that a 51-49 foreign-Vietnamese joint venture would be possible. There has, however, not been any real progress made towards the Vietnamese government accepting this specific condition for WTO accession. Instead, the government insists Vietnam be exempted from the criterion, although there is no doubt that an alleviation of the restriction on foreign company control certainly would open up the market, not only in the field of telecom. Mr Wenneberg emphasises the fact that Ericsson definitely would be interested in establishing a fully-owned manufacturing business. The current set-up in the form of a representation office means that all of Ericsson's contracting has to be done off-shore to avoid taxation in Vietnam.

Operator activity is primarily conducted by setting up a BCC contract, that is, a business co-operation contract (see *supra*). This form of cooperation has a time limit of ten years, after which the foreign partner must concede the company in its entirety to the domestic partner for the price of one US dollar, which makes long-term investments cumbersome. On the other hand, in a BCC, foreign investors are not required to establish a Vietnamese juridical entity; the terms and conditions of the written contract will basically determine the rights and obligations between the parties. The domestic partner typically provides administrative know-how, knowledge of local politics and business customs, personnel and license rights. A BCC often has a 50-50 ownership structure.

Whilst not particularly common in Vietnam, in comparison to joint ventures or EFOCs, Business co-operation contracts are well known to the telecom industry. Vietnamese law provides that construction and sales of international and domestic telecommunication networks can only be in the form of a BCC. However, there has been an opening towards a freer form

for foreign investment in Vietnam, though; in 2005, if all goes according to plan, it will be possible for a foreign party to participate in a joint-stock company with a maximum owner's share of 30 percent. The current BCC:s of, for example, Comviq and Millicom are now being transformed into joint-stock companies.

### 3.2.1.3 Technology Transfer

In the case of Ericsson in Vietnam, technology transfer is mainly present through the maintenance contracts purchased by the state. The possibilities for technology transfer, which would be highly profitable for a nation in Vietnam's position as a burgeoning Asian tiger, would naturally be very much greater were the government-imposed restrictions on, for example, the telecom market, less inhibiting. From Ericsson's point of view, there is little to worry about as far as intellectual property rights go, seeing as how today's level of technical knowledge in Vietnam does not permit copy-cat activity on any larger scale, or, rather, on any scale at all. In China, as a comparison, state-owned companies advertise their products as maintaining 'Ericsson-quality for half the price'. There is not much to be done about this, however, in pronouncedly state-centralised regimes such as China, or Vietnam, where state-owned companies are openly favoured before those privately owned. This is a risk to be considered mainly by companies supplying simpler products. Ericsson's strategy has been to simply stay ahead of copy-cats; research and development, as well as experience, keeps Ericsson well ahead, according to Mr Wenneberg.

### 3.2.1.4 Contractual Relations

In Ericsson's experience, the contractual process in Vietnam differs considerably from the traditional Western approach. Seeing as how, in Vietnam, state control is present on a much larger scale, a definitive bureaucratic character is given also to commercial relations. In fact, the contractual process is made into a purely bureaucratic one. Negotiations take on an air of public purchasing; a given offer is made subject to a strictly formalistic evaluation, where a number of points is awarded on the merits of the offer, according to pre-determined standards. A time-period of about one year from start of negotiations until the final version of the contract is to be expected; up to 30 different signatures, that is, the approval of 30 different people, may be needed. In short, it is to be expected that all commercial decision-making activities will take considerably longer than is normal according to Western criteria, due to the prolificity of Vietnamese bureaucracy, be it in public or private organisations.

## 3.3 Joint Ventures

### 3.3.1 ABB Transformers Vietnam Ltd.<sup>34</sup>

#### 3.3.1.1 Selecting a Local Partner

As a result of domestic regulations, a joint venture was the only choice for entry into the Vietnamese market during the first half of the 1990s. The selection of a local partner and a location for the new factory or facility is an important strategic decision. Competition dynamics and past relationships seem to be the decisive factors. The Swedish engineering giant ABB accessed the local market by establishing a joint venture that effectively took over an existing local facility. ABB had to take responsibility for restructuring and technologically upgrading the local company. ABB as a company displays several features that were very attractive and were sought by the local government and businesses, i.e. substantial capital investment, transfer of modern technology and management methods, as well as the continued employment of local staff.

The ABB joint venture is held to be one of the most successful foreign investments in Vietnam, but after a couple of years, for both external and internal reasons, ABB took over and the business was transformed into a wholly-owned foreign company.

Obviously, there is a huge difference in culture between Vietnam and the Nordic countries in terms of beliefs, behaviour and attitudes. However, the relationship between Vietnam and the Nordic countries has been developing since the 1970s, beginning with the political support from Sweden during the American War and the years that followed. Sweden started building the Bai Bang Paper Mill in the Vinh Phu Province. This is one of the many reasons for the very positive attitude of the Vietnamese towards Sweden.

#### 3.3.1.2 ABB

The ABB group is one of the major multinational enterprises that specialises in global electrical industries. ABB mainly manufactures electrical transformers for power generation plants. They have a strong impact on the efficiency of power distribution and consumption and industrial installations. The group is a federation of national companies and uses a matrix structure for its organisation. In Vietnam, ABB has diverse business interests. In the beginning, power generation was its key business focus, apart from activity in electrical engineering projects and the supply of electrical devices for large industrial projects. However, it was in the area of transformer production that ABB wanted to enter the Vietnamese market in the form of a joint venture for local manufacturing in Vietnam.

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<sup>34</sup> Interview with Mr Eric Rydgren, President & Country Manager, ABB, Vietnam, 041006.

### 3.3.1.3 Hanoi Transformer Manufacturing Factory (HTM)

In Vietnam, before the 1990s, all transformer manufacturers were state-owned enterprises (SOEs) managed by different ministries. The sub-sector was on the government's high-priority list for seeking foreign investment. HTM was one of the five major distribution-transformer manufacturers in the country and enjoyed about 50% of the market. For the local company, the joint venture seems to be the best way to retain its identity, obtain foreign capital, adapt and modify foreign technology and enter into international markets.

### 3.3.1.4 The JV – ABB Transformers Vietnam Ltd.

Initially, the joint venture achieved financial success very quickly. The joint venture broke even after only six months of operations, a record time compared with most of the ABB transformer joint ventures worldwide. However, later, when expanding into the power transformer production, the joint venture began to make losses. This was partly because the market did not grow as quickly as expected and also because of the heavy debt servicing.

The joint venture was at the time the best choice of establishment form for ABB, since the government policy did not then<sup>35</sup> encourage 100% foreign-owned companies. In addition to that, because of the import substitution strategy and the fact that all customers of this industry are state-owned entities, it would have been very difficult for ABB to compete using imports.

HTM (CTBT) insisted that its contribution to the joint venture was its equipment, technical capabilities and human resources, not the land-use right conferred by the state. Erik Rydgren emphasizes the fact that CTBT had an existing facility, an established market and could guarantee market access. The main features brought by ABB to the joint venture were in product design and management strategies.

### 3.3.1.5 Regulations Limiting Co-operation

For instance a foreign enterprise, such as ABB, must give priority to employment of Vietnamese citizens. Decree 105 was issued in 2003 and limited the ratio of foreign employees within an organisation to only 3 %, with 50 foreign employees as the maximum limit set. After many protests from the foreign business community, this was raised to 4.5% and may well be removed altogether in the near future. Foreign workers may be employed for jobs which qualified Vietnamese employees are not available. However, enterprises employing foreign workers are required to have training programmes to transfer their skills to the Vietnamese.

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<sup>35</sup> Today, however, the Vietnamese government encourages foreign-owned companies on the domestic market, albeit not in all areas of commercial life.

### 3.3.1.6 Concluding Remarks

The joint venture was the only mode of entry available at the time of ABBs appearance on the Vietnamese market and, in the beginning, it seemed a satisfactory format for the domestic as well as the foreign partner. Over time, however, both sides discovered that there are many problems connected with this way of doing business. In the summer of 2003, ABB finally acquired the stake of its local partner and thus attained full ownership and control over the venture.

## 3.4 Enterprises with 100% Foreign-owned Capital

In contrast to the joint ventures, enterprises with 100% foreign-owned capital (EFOCs) are owned by foreign investors independently of Vietnamese authorities. An EFOC is the subsidiary of a foreign enterprise. The ownership gives the foreign investor complete control over the enterprise without reference to a local partner or the Vietnamese governmental entities. EFOCs are independent legal entities under Vietnamese law, with limited liability, distinct from the parent company. An EFOC can easily co-operate with a local enterprise in the form of a joint venture and it offers a number of advantages. The local operations and investments can start more rapidly and there is less likelihood of failure.

The application procedure for establishing an EFOC is similar to that for a joint venture. The foreign company must submit a charter together with a completed application form and corporate documents of the company, to the investment licensing authority, i.e. the Ministry of Justice. Legal capital contributions for an EFOC may take the same form as for a joint venture.

## 3.5 Business Co-operation Contracts

A business co-operation contract (BCC) is defined by the FIL 2000<sup>36</sup> as being a contractual relationship between two or more companies which does not constitute a separate legal entity but which is licensed to operate in respect of producing goods or providing services in Vietnam.<sup>37</sup> Most issues relating to joint ventures, such as the application process and the capitalisation, generally apply to BCCs as well. Since the Vietnamese government is only interested in attracting investors that will bring in the greatest possible amount of capital in Vietnam, they require a minimum capital investment level of \$ 10 million.<sup>38</sup>

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<sup>36</sup> Chapter I, Article 9 and Chapter II, Article 5 FIL 2000. See Nguyen, T., 'New Foreign Investment Law Implementing Regulations', East Asian Executive Reports, 1997, p.7.

<sup>37</sup> McCulloch, C., *Foreign Direct Investment in Vietnam*, Sweet & Maxwell - Asia, 1998, p.23.

<sup>38</sup> Matarazzi, M., 'Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and gas Industry under the 1995 Land Law', North Western Journal of

There are some drawbacks with this structure. Since the BCC is not a separate legal entity, it cannot hire Vietnamese workers directly. The Vietnamese partner will therefore usually do the local hiring. This limits the foreign party's control of the relevant work force. The main disadvantages are the unlimited liability of the parties and the inability to take advantage of various provisions of the law giving favourable tax treatment to other forms of investment. However, the liability problem can be solved. The foreign partner can establish a special purpose investment vehicle offshore, which enters into the BCC. The advantage of the BCC model is that it offers flexibility that a joint venture or an EFOC cannot offer. Overall, a BCC can do whatever the partners desire to do and their objectives are. The contract can be designed to perform a certain task and end when that goal is achieved. The parties are in a contractual approach free to determine their respective rights and obligations, along with the sharing of business profits and losses. However, the BCC is not an ongoing relationship for a specific period of time and it is therefore not suited for BOT-projects that are long-term and complex arrangements.

Before a BCC is formed, an application must be made for a business co-operation license. The application is submitted to the Ministry of Justice, i.e. the same authority as in the case of a joint venture and an EFOC, and must set out the parties to the contract, the purposed scope of BCC and the capital, technology or equipment to be provided by each party. Joint ventures already established in Vietnam may be parties to BCCs. There appears to be no limitations on the duration of a BCC or the profit sharing.<sup>39</sup>

### 3.6 Concluding Remarks

When choosing the best investment vehicle, the foreign investor has to calculate the risks and seek to establish in a form that affords maximum control over the operation. A foreign investor in an EFOC has the greatest management control and a substantial return on capital.

A BOT contract between an EFOC and the Vietnamese government is the best form for foreign investors with the aim on large-scale, long-term investing projects. As will be explained *infra*, the investor has the benefit of controlling the management decisions and has a strong incentive to operate efficiently due to the limited duration of the project and the high degree of financial risk.

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International Law and Business, 1999, p.5.

<sup>39</sup> *Ibid*, p. 8.

# 4 The BOT Vehicle

## 4.1 Introduction

A developing nation such as Vietnam can today fund power plants, roads, hospitals, airports and other infrastructure needs through a financing technique called the BOT model.<sup>40</sup> During the early 1990s, it was impossible to implement BOT projects in Vietnam because the government preferred to avoid foreign control and private influence of the infrastructure. However, the *Doi Moi*, the poor state of infrastructure in Vietnam and the realization that it was beyond the means of the government to build all the infrastructure necessary based on state financing, led to amendments to the FIL in late 1992, which reversed the former policy.

Nowadays, Vietnam has the option to turn to the private sector to overcome the economic obstacles attached to the burden of infrastructure expenditure, while still remaining in control over the chain of events. The BOT model can best be described as a hybrid between a traditional state monopoly and a private enterprise.<sup>41</sup> The country is currently opening up its internal market and allowing foreign investors to own and operate large-scale projects through cross-border private financing. Traditionally, a developing country's infrastructure projects have been financed through the aid and lending of the International Bank for Reconstruction and Development (IBRD), the World Bank or the International Development Association (IDA).<sup>42</sup> In addition to that, emerging economies have obtained financing through loans from regular, commercial banks, loans from Export Credit Agencies or raised money through the vehicle of equity financing.

Conventional ways of funding for infrastructure have not met the critical needs and demands of the developing countries. As a result of the economic boost in East Asia combined with the globalization of the capital market and the *Doi Moi* in Vietnam, the popularity of privately financed investment (PFI) and the project finance method of funding large-scale projects, has increased tremendously. The BOT-model, one of the variants under the umbrella-term PPP, public private partnerships, is an attractive mechanism to use because it takes the interest of all the shareholders into account and it

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<sup>40</sup>The term 'Build-Operate-Transfer' (BOT) is sometimes used interchangeably with the term 'Build-Own-Operate-Transfer' (BOOT). It is actually the latter definition that more accurately describes the nature of a project finance arrangement. There is a number of variations on BOTs. However, the generic term BOT will be used throughout this thesis, to refer to the various methods unless a particular aspect of one form is germane to the discussion.

<sup>41</sup> Levy, D. A. 'BOT and Public Procurement: A Conceptual Framework', Indiana International & Comparative Law Review, 1996, p.2.

<sup>42</sup> Stewart-Smith, M., 'Private Financing and Infrastructure Provision in Emerging Economies', 26 Law and Policy in International Business, 1995, p.10.

offers the dual benefits of additional capital and more efficient methods of financing without straining the already overtaxed budgets.<sup>43</sup>

## 4.2 The BOT Structure

### 4.2.1 The Parties Involved

#### 4.2.1.1 The Host Government

The host government is generally very eager to see the project succeed, because the BOT operates for a limited duration and it is transferred to the government after that term expires. Usually the country does not have the capital sources and simply cannot afford the project or does not want the liability of repaying a multilateral loan.<sup>44</sup> Common factors, influencing governments to adopt these privatisation models and achieving economical and infrastructural development, include the opportunity of accessing advanced technology and expertise and attracting foreign direct investment to the country. Hence, BOT allows the host government to avoid overtaxing its budget and taking vast loans, while the foreign investor stands to make agreeable returns on the venture.<sup>45</sup>

Another principal benefit of utilizing the BOT scheme is that it offers the host government the opportunity to maintain the important symbolic role as an infrastructure provider and supervisor. Retaining the confidence from the population and controlling the public opinion is of an essence in a communistic country such as Vietnam. Some critics accuse the Vietnamese government of 'selling out' to foreign investors. This pessimistic view is toothless, though, because the entire objective and point with the BOT approach is that the private foreign investors eventually will transfer the management and the ownership back to the domestic authorities.

The BOT regulations in Vietnam provide that the government will, from time to time, issue a list of approved projects for BOT investment. It is also possible for other projects to be approved on an ad hoc basis and so a foreign investor may approach the relevant authority to gain approval. Theoretically, in Article 4 FIL 2000, a BOT project may be 100% foreign-owned in which the participants hold shares, but in practise, joint ventures with Vietnamese local partners are more encouraged and embraced by the government.

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<sup>43</sup> Kerr, T. M., 'Supplying Water Infrastructure to Developing Countries via Private Sector Project Financing' *Geo. Int'l Envtl. L. Rev.*, Fall 1995 p.8.

<sup>44</sup> *Ibid*, p.4.

<sup>45</sup> Sozzi, C. J. 'Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries' , *Santa Clara Computer and High Tech. Law Journal*, 1996, p.2.



#### 4.2.1.2 The Private Foreign Investors

A BOT can be entered into by either a joint venture or a foreign-owned entity that acts as a subsidiary. If an EFOC participates in a BOT arrangement, it will not have a domestic partner that will connect it to the governmental authorities. A single purpose corporate subsidiary can be utilised for the project financing as a project owner. This subsidiary often lack sufficient capital to endure the financial and operational risks in a BOT-project. Therefore, the parent/project sponsor often guarantees to assume the obligations of the subsidiary/project owner.<sup>46</sup>

The private foreign developers differ from the host government in the way that they have higher budgets for research and development and are approaching the market with stronger profit incentives and objectives.<sup>47</sup> Private investors also have access to extensive expertise, knowledge of the construction techniques involved and sophisticated equipment. Most BOTs are large and involve a substantial monetary investment, which yield benefits over the long-term. Having the governmental authorities and ministries as a contract partner can make the permits and licence process smoother. It may also secure a political stability without any unpleasant surprises within the legislative area. It is crucial that the investor and the host government clearly understand each other's latent intentions and goals. The investor must refrain himself from setting unreasonably high expectations on the economic returns and the host government must learn how to delegate and reduce their need and demand of controlling the business community and the market.

#### 4.2.1.3 The Project Company

In a BOT project, a private project company is awarded an assignment to finance, build and operate a facility that would normally be governed by a public authority in a developing nation.<sup>48</sup> After the foreign enterprise is awarded the project, the private investors arrange the equity and debt financing, the project company is set up and the group of investors normally becomes an association of shareholders. The shareholders must agree on which level their respective capital contribution, with which to finance the company, will be.

#### 4.2.1.4 The Lenders

The lenders provide tailor-made financing for each specific BOT-arrangement and they usually do not hold shares in the project company. When the facility in question is built and completed and the revenues commence, the repayment of the debt and interest payment usually begins.

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<sup>46</sup> Loke, A.F.H. 'Risk Management and Credit Support in Project Finance', Singapore Journal of International and Comparative Law, 1998, p.16.

<sup>47</sup> Levy, D. A. 'BOT and Public Procurement: A Conceptual Framework', Indiana International & Comparative Law Review, 1996, p.3.

<sup>48</sup> Ebner, G. *et all*, 'Insurance of BOT Projects – A challenge and an opportunity', IMIA 16-67(97)E, Sun City, South Africa, 1997, p.2.

In a BOT, the lenders are of course interested in obtaining an attractive interest with calculable risks. In traditional financing schemes, the lenders insist that the project's sponsors retain permanent and unlimited liability for the borrower's/ project owner's liabilities. However, this does not apply to the financing of BOT projects. In these cases, the lenders do not look at the balance sheet or the underlying assets of the sponsors, but focus on the projects assets and the future revenues generated from the operational phase.<sup>49</sup> Given the special nature of BOT arrangements, optimal financial and risk conditions can be difficult to accomplish and therefore the loan is generally accompanied by other various guarantees and insurances.

#### 4.2.1.5 The Constructors and Operators

The contractor builds the facility and owns and operates it for a fixed period of time or until the entire loan has been repaid and they have received a predetermined return. The actual operational phase can last for 10-50 years depending on the magnitude of the project.<sup>50</sup> When the contract time is due, the project company transfers the facility without compensation together with the project assets, technology and services to the government or to the appropriate public authority, which owns and operates the facility thereafter.<sup>51</sup>

### 4.2.2 Project Finance as an Investment Method in BOT Arrangements

In a BOT project, the lenders cannot depend on an established credit or on the physical assets on the balance sheet of the project company. Instead, the lenders rely on the expected flow transactions and performances on the resources in the project that do not yet exist but will be generated in the future.<sup>52</sup> In other words, the lending is based on the merits and reputation of the project rather than on the credit of the project sponsor. The financing method that is used to bring capital to the project is called project finance. The project company and the project finance method are the cornerstones of the BOT-approach.<sup>53</sup> Project finance is particularly fitted for new construction projects, where a sponsoring foreign investor or a consortium of lenders supervises the construction and operation of a BOT project facility for a determinate duration. Project finance is a complex venture and loans for the project are made on two alternative approaches. The vehicle is

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<sup>49</sup> Fletcher, P. and Welch, J., 'State Support in International Project Finance', Butterworth's Journal of International Banking and Financial Law, vol.8, no. 8, p. 1993, p. 365.

<sup>50</sup> Yeo, K.T and Tiong R. L.K, 'Positive Management of Differences for Risk Reduction in BOT Projects', Int. Journal of Project Management 18 (200) p.257.

<sup>51</sup> Bruner, P.L. and O'Connor, P.J., 'Project Delivery Methods and Contract Pricing Arrangements', 2 Bruner & O'Connor Constr. Law, 2004, p.1.

<sup>52</sup> Penrose, J.F., 'Ratings Criteria for Project Finance Transactions', Practising Law Institute, Corporate Law and Practice Course Handbook Series, 2000, p.10.

<sup>53</sup> Ebner, G., 'Insurance of BOT Projects, a Challenge and an Opportunity', IMIA 16-67(97) E, 1997, p.2.

either non-recourse, i.e. when lenders are only able to rely on the cash flow of the project or limited recourse, i.e. when lenders also have the right to look to certain assets of the borrowers and project sponsors.

### 4.2.3 Non-Recourse or Limited-Recourse Debt Financing

It is a typical feature of a BOT project, that the project sponsors invest relatively little equity capital in setting up the project company. In its place, the project company borrows funds for the specific purpose of the project without the sponsors being liable for the repayment of the loan, in other words, non-recourse financing. Since infrastructure and BOT projects are capital intensive, project sponsors typically seek to finance them on a non-recourse basis. However, non-recourse financing is not the predominant method within BOTs, because the only security the lenders can lean on is solely the project itself, its revenues and the project's business reputation.<sup>54</sup> The beauty of it, for the project sponsors, is that it relieves them from liability to repay the debt and make interest payments on principal in event the cash-flow generated by the project turns out to be too insufficient to service debt obligation. The sponsors do not have any obligations to guarantee the repayment, except to the extent expressly assumed by them. Furthermore, the sponsors do not have to report the project company's liabilities in their own balance sheets. Instead, the interest rates and repayment instalments for the loans are taken from the project company's cash flow.<sup>55</sup> The failure of a non-recourse finance can therefore cause significant losses to both the lenders and the host government, but as long as the project company remains viable, they do not necessarily need to suffer.

For the most part, limited-recourse is the preferable mechanism and approach within project finance. The lenders generally require securitization and a commitment from the project sponsors under the terms of the project completion agreement to mitigate the uncertainty and diversify the risks. Naturally, they take a higher interest rate for this increased risk taking. In addition to that, the lenders may also require other guarantees or warranties, if the project is considered venturesome and the risks associated with the non-recourse debt simply are too high. Project sponsors might grant a letter of comfort in favour of the lenders in a non-recourse financing saying that, as parent companies, they generally support their subsidiaries. Comfort letters, of course, may be merely statements of present intention rather than instruments creating legal obligation. Nonetheless, they can be just as effective in imposing a moral obligation in a multinational corporation to support their overseas project companies.

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<sup>54</sup> Fletcher, P. and Welch, J., 'State Support in International Project Finance', *Butterworth's Journal of International Banking and Financial Law*, vol.8, no. 8, p. 1993, p. 365.

<sup>55</sup> Zhang, N., 'Moving Towards a Competitive Electricity Market? The Dilemma of Project Finance in The Wake of the Asian Financial Crisis', *Minnesota Journal of Global Trade*, Summer 2000, p.2.

#### 4.2.4 The Licensing Procedure and the Legislative Exemptions for BOTs in Vietnam

Detailed bidding requirements under the relevant Vietnamese BOT regulations govern the tendering by the foreign and the local contractors for projects in Vietnam. Not to mention, the UNIDO Guidelines for Development, Negotiation and Contracting of BOT projects and UNCITRALs Model Law on Procurement of Goods, Construction and Services, that ought to be followed and taken into consideration.<sup>56</sup>

Foreign contractors are required to obtain a license from the Ministry of Planning and Investment (MPI). Decree No 24/2000/ND-CP was issued in order to simplify and streamline the licensing process. Previously, the MPI was the only authority for licensing applications. Under the new decree, the provincial people's committees and management boards of industrial and export-processing zones are authorized to issue investment licences as well.<sup>57</sup> Preference is often given to those foreign companies that intend to employ local labour or utilize local materials in addition to those companies who anticipate introducing advanced technology, such as ABB or Ericsson.<sup>58</sup> The decree also simplified the documentation and evaluation process. After the technical design has been approved, the investor is entitled to start with the construction work without any construction permit. Even the official fee for foreign investment has been abolished.<sup>59</sup>

The BOT Regulations and the FIL Implementing Regulations grant a number of special privileges and include a number of incentives to foreign investors in BOT projects. The project companies are excused from land taxation, i.e. they can enjoy free land rental during the project time. In the FIL, there is also an exemption from import duties on a number of goods including, but not limited to, equipment and machinery, imported for the purpose of implementing the contracts.<sup>60</sup> In addition to that, BOTs generally enjoy a lower profits tax rate and a 5% withholding tax rate, i.e. the lowest normal rate.<sup>61</sup> The Vietnamese government also assures the BOTs the right of converting revenues in local currency to hard currency and the right to convert Vietnamese currency earnings into foreign currency to repay loans and pay the foreign investor's share of profits. Finally, to further ease the burden on BOT companies, they also have the right, subject to approval, to open off-shore bank accounts for borrowing and debt service.

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<sup>56</sup> Wallace, D., 'UNCITRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects', *Tulane Journal of International and Comparative Law*, 2000, p.2.

<sup>57</sup> Investment licensing boards cannot refuse to grant licenses. The MPI have 15 days from the date of receiving the applications to grant the licenses to the investors.

<sup>58</sup> Interview with Mr Eric Rydgren, President & Country Manager, ABB Vietnam, 041006 and Chapter I, Article 3 FIL 2000.

<sup>59</sup> Nguyen, T, 'New Foreign Investment Law Implementing Regulations', *East Asian Executive Reports*", 1997, p.3.

<sup>60</sup> See Chapter IV, Article 46 FIL 2000.

<sup>61</sup> Nguyen, T, 'New Foreign Investment Law Implementing Regulations', *East Asian Executive Reports*", 1997, p.5.

## 4.3 Construction and Operational Risks

The risks involved in the BOT-project's initial construction and operational phases differ from the risk-taking attached to the projects financing and the commercial risks associated with the political (in)stability. The primary political risk arising during the construction and operational phase is the threat of nationalization from the host government.<sup>62</sup>

The construction phase is particularly critical. It is said that the construction risk constitutes the biggest uncertainty in project financing.<sup>63</sup> Operational and construction risks will be borne by the constructor and are usually more within his own control than political and markets risks are. The risks range from the constructors inability to perform and finish the project on time, failure to perform within the budget or as warranted to the competence of the work force and the expertise of the management.<sup>64</sup>

Throughout the operational period, the project operator is responsible for operating and maintaining the project after the completion. The risks may revolve around technical faults and operating defects resulting in non-delivery or non-performance to the host government. The performance risk will be shared between the constructor and the operator, but it is of significance, though, that the operating risk and the completion risk are distinguished from each other in the contractual agreement. The constructors delay in completion of the facility will consequently also delay the beginning of the revenue-generating operations for the operator. Private investors have strong incentives to start the project on time and to operate efficiently. The lenders guard against the risk of delays and cost overruns by extracting completion guarantees from the project sponsors.<sup>65</sup> Most BOT agreements have covenants that penalize the operator for delays and inability to perform. If the project fails to reach completion, there will be financial losses such as period interest and lack of commercial revenues. Debt-service reserve funds and other structural protections go some way to mitigating operational risk, but not all the way.

## 4.4 The Contractual Agreements

In a BOT concession, the players are the representative authorities of the host government, the entrepreneurial promoter, the bankers and then the other secondary stakeholders. The key, underlying BOT contracts must be

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<sup>62</sup> See further Section 5.2.1.1 concerning the risk of nationalization and Chapter II, Article 23 of the 1992 Constitution.

<sup>63</sup> Ebner, G. *et al.*, 'Insurance of BOT Projects – A challenge and an opportunity', IMIA 16-67(97)E, Sun City, South Africa, 1997, p.5.

<sup>64</sup> Penrose, J.F. 'Ratings Criteria for Project Finance Transactions', Practising Law Institute, Corporate Law and Practice Course Handbook Series, 2000, p.10.

<sup>65</sup> Loke, A.F.H., 'Risk Management and Credit Support in Project Finance', Singapore Journal of International and Comparative Law, 1998, p.4.

signed by the investor and a competent state body and their enforceability is of highest importance. The foreign counter-partners play a significant role in how the contracts are negotiated, the risks allocated, and it is to be noted that the parties' intention is to be clearly established.

The investor is responsible for the design, construction, maintenance and general implementation of the project. The foreign investor is regularly also the principal investor in the BOT-company. To succeed with the contract negotiation and reach consensus, the foreign party must have deep awareness and appreciation of the host government's values and the Vietnamese business culture as such. In the contract negotiation process, the parties should concentrate on establishing a fundamental base and cultivate a long-term strategic partnership and commitment.<sup>66</sup>

Issues of documentary enforceability lie at the heart of any project financing. However, one should be careful when interpreting the contracts and not give the documents too much juridical weight and meaning as powerful tools in the battle of legislative rights. They are best characterized as letters of understanding, rather than binding commitments, because of the lack of enforcement possibilities for the foreign partner.<sup>67</sup> Vietnam has not yet reached the level of providing a comprehensive legal regime for concession agreements and their enforceability.

#### 4.4.1 The Construction Agreement

The project company is by itself not able to manage the project and therefore has to arrange cooperation with companies that have resources and that can build and operate the project on a turnkey basis. The construction contract regulates and diversifies the obligations and risks of the construction contractor and the project company. The completion date, the budget and the price of the project should be fixed and the parties should clearly establish the intentions and goals.

#### 4.4.2 The Concession Agreement

After the participants have organized the project company, they have to secure an exclusive license from the government to collect revenue, construct, control and operate the project, i.e. a concession agreement.<sup>68</sup> It is defined as a license granted by a sovereign government to a foreign company for the express purpose of exploiting a natural resource, developing a geographic area, or pursuing some particular venture, for

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<sup>66</sup> Yeo, K.T and Tiong R.L.K., 'Positive Management of Differences for Risk Reduction in BOT Projects', *Int. Journal of Project Management* 18 (200), p. 260.

<sup>67</sup> Nevitt, P.K., *Project Financing*, Euromoney, London, 1989, p.18.

<sup>68</sup> See further Sozzi, C.J. *Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries*, Santa Clara Comp. and High Tech. Law Journal, 1996, p.5.

which the government desires the corporation's expertise, assets, technology or capital. The agreement plays a central role in the project process and preserves continuity between the project company and the host government when changes occur along the way. After the BOT contract is signed between the foreign investor and the government, it must be authorized by the State Agency of Vietnam in order to be valid and furthermore, it must be submitted to the banks before coming into force.<sup>69</sup>

The terms and conditions regulate and authorize the operator to construct and operate the facility, while the government retains ownership interest in the project company's assets. The purpose is to control the allocation of risks, to define what the operator is permitted to do and the length of time for which concession is granted. The concession agreement and the construction agreement are inextricably linked to each other. The concession exists for a limited period, until the operational phase is over, the accrued debt is paid back and the investors have gained a reasonable return on equity. After the facility is transferred back to the government, the concession agreement has fulfilled its purpose and is no longer of significance.<sup>70</sup>

#### 4.4.3 The Consortium Agreement

In these large BOT arrangements, the project company may be controlled by a consortium. A consortium in this sense usually consists of different construction companies, lenders, equipment suppliers and consultants. Participation of the host government through an equity position is also customary. The contract should define the parties funding responsibilities and liabilities. A delivery contract is generally concluded between the construction consortium and the project company. In general, it takes the form of a turnkey contract as well, with a fixed price and stipulating the real objective of the construction companies' efforts.<sup>71</sup>

#### 4.4.4 The Operation and Maintenance Contract

The operation and maintenance contract is concluded between the project company and the operator<sup>72</sup> and it is central in governing the facilities day-to-day running.<sup>73</sup> If the project proceeds according to the original plan and agreements, and the cash flows have paid off the construction and financing costs, this has succeeded without any substantial financial support from the

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<sup>69</sup> See further Art.19 FIL 2000.

<sup>70</sup> Sozzi, C. J. 'Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries', Santa Clara Comp. and High Tech. Law Journal, 1996, p.15.

<sup>71</sup> Ebner, G. *et all*, 'Insurance of BOT Projects – A challenge and an opportunity', IMIA 16-67(97)E, Sun City, South Africa, 1997, p.7.

<sup>72</sup> The operator is usually also a shareholder in the project company.

<sup>73</sup> Ebner, G. *et all*, 'Insurance of BOT Projects – A challenge and an opportunity', IMIA 16-67(97)E, Sun City, South Africa, 1997, p.7.

government. In an ideal project world, the project company will be so vested with expertise and technological capability that it can enable the host government to assume control and effectively operate and manage the continuing project.

#### 4.4.5 Breach of Contract

BOT arrangements require detailed contract drafting due to the complex legal relationships between the parties and the importance of adequate risk allocation. As expected, as is the case in any other contractual relationship, a breach of contract may occur from any of the parties involved. The project finance company usually has a concession period for 20-30 years in which it is supposed to recover the costs and repay its lenders. It is essential to regulate the parties step in-rights and step-out rights in the concession agreement. The exit mechanism, in a dispute settlement context, will be further explained and analysed *infra*. If a party decides to terminate the contract early, the party will have increased damage liability as a result of that breach.<sup>74</sup>

The government might force re-negotiation or completely repudiate the contracts. This can be done either through producing laws and regulation that makes the contract invalid and worthless or simply by annulling the contract. The government may also try avoiding the legal consequences of the contracts by hiding behind the sovereign immunity.<sup>75</sup> Many developing countries are reluctant to waive their sovereign immunity contractually, but if the waiving is agreed through negotiations between the parties, it will definitely give the foreign party an opportunity to take arbitral actions in case of a breach.<sup>76</sup>

### 4.5 Concluding Remarks

Practical experiences with the BOT schemes in developing nations are relatively sparse. Most of the current BOT projects in emerging economies involve power and transport projects. The few BOT projects that exist have shown that the public sector seems unfit for effective and efficient management of infrastructure assets while private investors perform substantially better than the state in terms of investment, capacity expansion, service delivery and efficiency.

Infrastructure development and the financing of BOTs present a number of formidable challenges. Nonetheless, the Vietnamese government has

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<sup>74</sup> Sozzi, C. J., 'Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries', Santa Clara Comp. and High Tech. Law Journal, 1996, p.34.

<sup>75</sup> *Ibid.* p.12.

<sup>76</sup> Fletcher, P. and Welch, J., 'State Support in International Project Finance', Butterworth's Journal of International Banking and Financial Law, vol.8, no. 8, p.373.



identified a large number of construction projects that it wishes to complete over the coming years, and the lists of projects seeking foreign investment are published regularly. This in turn demands immense capital expenditure beyond the capabilities of governmental resources, which is increasingly being provided by private investors.

The private financing has become essential to sustain many emerging countries' economic and infrastructural development. The benefits of an implementation through the BOT model clearly outweigh the projected risks. It offers an innovative solution to the host country to attract private capital without guaranteeing payment of project costs and without completely rearranging its economic market through direct privatization while at the same time being assured of future control over the industry. Not to mention the advantages of the technology transfer and expertise that an emerging country receives, when allowing foreign actors access to the domestic market. The know-how and skills from experienced foreigners are, for a country such as Vietnam, priceless. The opportunity for the foreign companies to gain access and directly participate in an otherwise unreachable and unpredictable capital market is of course valuable as well. When dealing with foreign capital investments in emerging economies, it is fundamental to make a distinction between investing and speculation. On one hand, investing is purchasing capital equipment to increase the productivity and on the other hand, speculating is purchasing securities to increase the returns on accumulated assets.<sup>77</sup> For a foreign company, investing capital and resources on a developing market is more often a speculation, at least initially, which will stage-wise transform into an actual long-term investment with the over-all effect of increasing the nation's production capacity.

Project finance based upon non-recourse or limited-recourse lending is an attractive mechanism for inviting private capital into the Vietnamese market. It corresponds very well with the national policy of staged privatization and concessionary licensing. Foreign companies that intend to invest in Vietnam should not propose deals that will allow them to reap high profits over a short period of time, because this will shift the commercial risk on to the Vietnamese government. Then again, Vietnam cannot expect foreign private corporations to invest on a market where there is fundamental uncertainty about future regulatory policies and governmental control within the business sector. Differences in perception and expectations are particularly problematic in BOT projects, since the stakes are extremely high for the participants. To achieve greater management control and stability, as well as minimizing the potential risks, the best investment vehicle in a BOT-contract is, without a doubt, to operate it as a 100 % foreign-owned entity.

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<sup>77</sup> Sorabella, W.B., 'Less Developed Country as Start-up Corporation: Adopting the Venture Capital Model for Development in Light of Global Capital Market Realities', Law and Policy in International Business, 2000, p.14.

# 5 Risk Identification and Allocation

## 5.1 Introduction

Before investing in an emerging economy such as Vietnam, it is essential for an investor to perform a systematic analysis of the risks associated with the project. The BOT mechanism offers a unique solution for Vietnam. The country can build and develop its infrastructure without increasing additional public expenditure and borrowing, but the risks associated with BOTs tend to be highly project-specific.<sup>78</sup> This privatization has many advantages. Not surprising, there are some disadvantages and risks that a foreign investor should scrutinise and carefully considerate. The removal of governmental resources as a financial sponsor places obligations wholly on the private investor. The untested risk allocation structure, potential conflicts of interest, issues regarding technology transfer and the limited nature of non-recourse financing are some of the factors that should make potential investors cautious when entering project financing and BOT arrangements.<sup>79</sup>

After a potential project has been identified, the investor searches for partners with whom to share the risks and development costs. The risks should be appropriately allocated between the participant involved, i.e. investors, lenders, suppliers and the host government. If this proves to be impossible, the risks should be passed on to the insurers.<sup>80</sup> Political risk insurance is available from both private insurance companies<sup>81</sup> and governmental sources. Since the predictability is incalculable, the rates are usually high and the amount of insurance coverage available is comparatively limited. This is an expensive protection, which may have a substantial cost impact on the project.<sup>82</sup> If political risk insurance is not affordable or simply not available, because foreign insurers are prohibited from carrying out business in the country, the measures explained in chapter 5.5 may be used as alternatives.

Apart from the complex risks variations and the difficulty in allocating and minimizing these risks, an investor is significantly exposed to the amount of money that is simply 'out there', often in the hundreds of millions of dollars. This also has to be addressed by various securitizations and guarantees. The fundamental risks that are associated with the project-financed BOT

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<sup>78</sup> Yeo, K.T and Tiong R.L.K, 'Positive Management of Differences for Risk Reduction in BOT Projects', *Int. Journal of Project Management* 18 (200) p.257.

<sup>79</sup> Tiong, R.L.K. and Jahidul, A. 'Financial Commitments for BOT Projects', *International Journal of Project Management* vol.15, 1997, p.76.

<sup>80</sup> Ebner, G. *et al*, 'Insurance of BOT Projects – A challenge and an opportunity', *IMIA* 16-67(97)E, 1997, p.3 and Loke, A.F.H. 'Risk Management and Credit Support in Project Finance', *Singapore Journal of International and Comparative Law*, 1998, p2.

<sup>81</sup> E.g. export credit agencies such as Overseas Private Investment Corporation.

<sup>82</sup> Nevitt, P.K., *Project Financing*, Euromoney, London, 1989, p. 291.

structure can be categorized into commercial, political and force majeure risks.

## 5.2 Political Risks

The more unpredictable risks are to be found within the political sphere. A political risk is the risk faced by an investor that a host country will expropriate, confiscate or nationalize the property of the investor. The result is that the government of the host country in some way is depriving the investor's right to use his property the way he chooses. Adverse changes in law by the government and the local currency's inconvertibility or non-transferability are also risks that are referable as political risks. The value of an investment in one nation can change dramatically if a new political party comes to power with radically different ideas for how the business in which one has invested will be operated. It is difficult to calculate this sovereign risk. However, since Vietnam is still under the communist flag, attached to a one-party system, this risk is unlikely to be realized, unless there is a revolution.

### 5.2.1 De Facto Expropriation

A host country may interfere with the private business sector in surprisingly hostile ways. Direct expropriation consists in the government's taking of property owned by a foreign investor and declaring that this is done for 'public purposes'. The investor may lose the right to the property in question or keep the nominal ownership, while the effective ownership is carried out by the public authorities. One way to expropriate is to confiscate a controlling share of equity in the on-going project company. To be classified as a legal expropriation, the requirements are that the expropriation is non-discriminatory, for a public purpose and accompanied by full compensation. The foreign investors can hedge against the expropriation risk, if he obtains a concession agreement with warranties and guarantees from the host government or forms a diversified consortium with investors from a wide range of countries. This will mitigate the loose ends and there will be less risk of fast, direct expropriation. Naturally, the risk of expropriation is reduced if the government has significant interest in the success of the project.<sup>83</sup>

However, political risks and expropriation do not always consist of direct state intervention. The investor will usually have indications that something is about to happen, e.g. increased legislation or increasing tension between the state and the investor. Indirect or creeping expropriation occurs when the

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<sup>83</sup> Fletcher, P. and Welch, J., 'State Support in International Project Finance', *Butterworth's Journal of Int. Banking and Financial Law*, vol.8, no. 8, p.374. and Barratt, J., 'Securitisation: Financing Projects through the Capital Markets', *Butterworth's Journal of Int. Banking and Financial Law*, vol.10, no.9, 1995, p 438- 464.

host government takes control over the facility through ad hoc legislation or requirements that the managers suddenly have to be appointed by the domestic ministries.<sup>84</sup> It is wise for the investor to reduce or eliminate new flows of capital into the host state during such events. Creeping expropriation is also exercised when the public authorities do not renew licences or import and export permits or when they make sudden changes in the government policy, for example on foreign ownership and land use rights. Taxes can also be used as a hidden tool to limit the foreign company's conduct of business when targeted on specific sectors.<sup>85</sup>

### 5.2.1.1 Nationalization

Nationalization is defined as the transfer of an economic activity from private ownership to the public sector or expropriating a foreign enterprise and maintaining it under the state control.<sup>86</sup> Occasionally, the host government can use the excuse 'for the purpose of economic and social reform', when depriving the foreign investor of his rights. In these cases, the infringement is nationalization as an impersonal form of expropriation, when depriving foreigner's property in the larger interest of society to advance a program of economic and social reorganization.<sup>87</sup> The Vietnamese government guarantees that they will not nationalize any lawful property of a foreign investor.<sup>88</sup> Communist states are keen to give guarantees of such kind in the legislation, to further ensure and attract investor and their capital.<sup>89</sup> However, there are exemptions that foreign investors need to take in consideration, i.e. for the reason of national defence, security and the national interest.<sup>90</sup>

### 5.2.1.2 Confiscation

When the host government decides to confiscate property without compensation, there is a slim chance that this may be categorized as a legal expropriation. A common form of confiscation is when the host government confiscates a controlling share of equity in the entity owning or holding the company. Confiscation can also be used as penalization, if the foreign investor has gone beyond any boundaries or regulations set out by the host government and there is a need to show a preventive repellent example, as a way to demonstrate the sovereign power and control over the business

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<sup>84</sup> Comeaux, P.E. and Kinsella, S.N., 'Protecting Foreign Investment under International Law – Legal Aspects of Political Risk', Oceana Publ. Inc., 1996, p.9.

<sup>85</sup> Nevitt, P.K., *Project Financing*, Euromoney, London, 1989, p.18.

<sup>86</sup> Paasivirta, E., "*Participation of States in International Contracts and Arbitral Settlement of Disputes*", Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, Helsinki, 1990, p.15.

<sup>87</sup> Comeaux, P.E. and Kinsella, S.N., 'Protecting Foreign Investment under International Law – Legal Aspects of Political Risk', Oceana Publ. Inc., 1996, p.6.

<sup>88</sup> See Chapter I, Article 23 in The 1992 Constitution.

<sup>89</sup> Sornarajah, M., *The International Law on Foreign Investment*, National University of Singapore, Cambridge University Press, 1994, p.95.

<sup>90</sup> See Chapter I, Article 23 in The 1992 Constitution.

community. Unfortunately, the investor is defenceless against such public actions.

## 5.2.2 Legal Risks - Ad Hoc Legislation

National legislative efforts of the host government will most definitely affect the regulation of a BOT project and a foreign investor's conduct of business in general. The stability and nature of the legal and regulatory framework are important factors in the risk equation. Contradictory interpretations of the Vietnamese laws are the result of regular and ad hoc amendments and changes. These laws are sometimes implemented with a socialist bias although they are based on Western premises. Contributing to this uncertainty is the existing rivalries between the ministries and the overall corruption.<sup>91</sup> As a related aspect of sovereign risk, a host country should provide a comprehensible tax and regulatory environment, so that the BOTs may operate on their day-to-day schedule with predictability.<sup>92</sup> Arbitral dispute settlement in a neutral forum and recognition of foreign judgments also offer further certainty and increase the reliability to foreign investors.<sup>93</sup>

The legislative development in Vietnam is still in its cradle. Laws are at times left intentionally vague and some local courts are given wide latitude to interpret and apply the legislation they prefer. Although many legislative measures and taxes are lawful, they may affect the foreign investors in an unappreciated manner. Tax, environmental, labour, insolvency and secured lending laws in addition to the threshold issues of contract enforceability must be evaluated before determining whether to initiate a BOT project or not.

Typically, the regulatory risks will be matters outside the control of any of the foreign actors. These areas characteristically produce non-commercial or political risks in which governments have the greatest discretion. Investors attach particular attention to these risks and are likely to require guarantees or other sources to comfort them. To abstain from these unanticipated regulatory actions of the public authorities, the investors should consider insuring against these infringements and taxes in areas that are particularly vulnerable. The risk of changes in law and regulation should be allocated to the creditworthy project sponsors or to the host government, i.e. those best capable of handling it.

The hedging against sudden legal regulations may be solved through a stabilization clause in the contractual agreement between the state and the

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<sup>91</sup> Matarazzi, M., 'Selecting a Corporate Form: Foreign Direct Investment in Vietnam's Oil and gas Industry under the 1995 Land Law', *North Western Journal of International Law and Business*, 1999, p. 5.

<sup>92</sup> Penrose, J.F., 'Ratings Criteria for Project Finance Transactions', *Practising Law Institute, Corporate Law and Practice Course Handbook Series*, 2000, p.9.

<sup>93</sup> Fletcher, P. and Welch, J., 'State Support in International Project Finance', *Butterworth's Journal of International Banking and Financial Law*, vol.8, no. 8, p.373.

investor. The clause asserts that the national law of the host state in effect on the date of the contract is the same law that will govern the relationship between the parties in case of future discrepancy.<sup>94</sup> It may be said to constitute a combination of a 'choice of law-clause' and a 'risk-hedging-clause'. Choice of law-issues concern both a project's operating documents and its financing document. The operation and maintenance contract, the construction agreement and the different supply agreements tend to be governed and regulated by local law, which is deceitful, because of the many pitfalls. The foreign investors have to keep alert and examine the domestic labour laws, price regulation and control policies, the responsibilities of government regulators of the sector and the tax regime governing the operation of the project, in order to avoid unexpected surprises.<sup>95</sup>

In FIL 2000, the Vietnamese government guarantee a general protection to foreign investors' legitimate interests and state aversion from detrimental legislative changes. In case of ad-hoc legislation, it is assured that the investment licenses guaranteed by the previous law will continue to apply or will be dealt with by the Vietnamese authority, either by an exemption in accordance with the new law or by proper and fair compensation where necessary. The FIL 2000 tends to give more legal protection to foreign investors and eliminate troubles for foreign investors in transferring legal capital.<sup>96</sup> Article 1.5 in the FIL 2000 states that if a change in laws adversely affects the interest of foreign invested enterprises or parties to BCCs, they will be permitted to continue to apply the incentives or favourable conditions stipulated in their investment license or may be entitled to:

1. change the objectives of the project;
2. an exemption and reduction of taxes according to laws;
3. a deduction of damages from taxable income, or
4. proper compensation in cases of necessity.

### 5.2.3 Currency and Foreign Exchange Risks

Currency devaluation is a result of fluctuating exchange rates and therefore a feasible risk within the political risk category. Currency risks are two-faced, however, and may also be classified under the commercial risk category, even though they may be the direct result of state intervention.

If the local currency depreciates, the cost of making payments may rise considerably and have a severe impact on the ability of the project company and its debt. An investment may very well be coming along as calculated and as expected, but a change in the currency exchange rate between the

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<sup>94</sup> Comeaux, P.E. and Kinsella, S.N., 'Protecting Foreign Investment under International Law – Legal Aspects of Political Risk', Oceana Publ. Inc., 1996, p.11.

<sup>95</sup> Stewart-Smith, M., 'Private Financing and Infrastructure Provisions in Emerging Markets', Law and Policy in Int. Business, 1995, p.8.

<sup>96</sup> See Chapter I, Article 1 and 7 FIL 2000.

investor's currency and the emerging markets domestic currency may become an unpleasant surprise in the net result.<sup>97</sup>

There are limited possibilities for a foreign company to hedge against domestic currency fluctuations. Payment to an offshore account is a possible option, along with linking the capacity of the local currency to hard currency values or pegging it to the exchange rate of the US dollar at a certain benchmark date.<sup>98</sup>

Sudden currency fluctuations are an undesirable occur of event for the host government as well. A multicurrency loan may help to control and diversify the risk. The Vietnamese currency is not convertible and the government is reluctant and unwilling to lower their level of control over the exchange of the domestic currency. However, the government has exempted BOT companies and they no longer have the problem of converting local currency into hard currency. If the government decides to change its mind and prohibit conversion of the Vietnamese Dong into hard currency, this will be considered as an expropriation of the assets of the investors.

### 5.3 Commercial Risks

Commercial concerns are a tremendous risk for BOTs. The projects should be designed so that they can attract consumers on a large scale, in relation to their ability to pay, especially in a developing country like Vietnam. The population in Vietnam is about 80 millions, hence, there is no lack of future consumers.<sup>99</sup> Identifying the potential customers is critical when analysing the outcome of the BOT, since the future cash flows are the assets and security that the lenders are relying on. Given that the principal source of revenue may be the consumer's fees, these must be carefully calculated to allow the investors to recover their costs without overburdening the consumers. Market risks refer to commercial risks and are associated with fluctuation in market demand and market price. A decreased market demand for the product or service offered by the BOT will also have the effect of drying up the revenue and hence the cash-flows of the facility.

As a result of the monopoly position on the market that BOTs may have, the project companies have few incentives to minimize the costs and fees to the consumers. This lack of competition should not be underestimated and the fees should be carefully regulated in the BOT contracts. By contrast, one may argue that they do not lack incentives at all. It is in the project investor interest, who acts both as the owner and as the operator, to make sure that

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<sup>97</sup> Sorabella, W.B., 'Less Developed Country as Start-up Corporation: Adopting the Venture Capital Model for Development in Light of Global Capital Market Realities', Law and Policy in International Business, 2000, p.14.

<sup>98</sup> Zhang, N., 'Moving Towards a Competitive Electricity Market? The Dilemma of Project Finance in the Wake of the Asian Financial Crisis', Minnesota Journal of Global Trade, 2000, p.4.

<sup>99</sup> However, 75% are within the agricultural sector.

the project is not a failure and gives substantial revenues and most importantly revenues on a long-term basis, in order to recover return on equity and service project loans.<sup>100</sup> These situations call for enduring patience and tolerance, hence there is no room for greediness in the investment strategy.

## 5.4 Risk Management

Foreign companies can protect themselves and their assets when investing in projects in potentially unstable countries in many ways. For a project financing to be successfully achieved, the risks enumerated *supra* must be considered, monitored and avoided throughout the life of the project. The allocation and identification of risks is a complex and demanding process, even when not dealing with emerging economies. Usually these projects exist in an uncertain environment and therefore there will always be unallocated risks attached that are unforeseeable. In addition to that, there is a lack of precedents and coherent legislative framework in Vietnam, and as a consequence, this will further complicate the procedure.

One significant aspect is that the governmental and legal regimes in Vietnam as a rule are not hostile towards foreign investors and are not opposed to privatization within BOT projects. The availability of foreign capital is a key issue, which affects the success of efforts to promote privatisations through BOTs. The FIL 2000 emphasizes in Article 1 that '*the Socialist republic of Vietnam encourages foreign investors to invest in Vietnam on the basis of respect for the independence and sovereignty of Vietnam*'. In other words, foreign capital is welcomed and the capitalistic development is embraced, albeit enriched with a little communistic attitude and perspective. When a foreign investor's property rights are violated through the course of expropriation, nationalization or confiscation, the host country is generally in a very politically unstable phase with a weakened economy and is taking decisions based on pure desperation, usually not thoroughly thought through. This course of action is naturally not popular among the foreign investors and it is definitely the least attractive choice for the governments as well. The support of the government is an essential ingredient in a prosperous BOT project. The investor and the host government ought to form a solid co-operation platform on an early stage in order to minimize the risk-taking and uncertainty.

### 5.4.1 Diversifying and Reducing the Risks

A sudden change in the political wind or an unstable financial climate can quickly erode the investor's legal rights and market profits. The lack of

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<sup>100</sup> Sozzi, C. J. 'Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries', Santa Clara Computer and High Technology Law Journal, 1996, p.10.



coherent, legislative framework often lead to confusion and the absence of the ability to foretell the future market fluctuations, which may corner the risk management. As mentioned above, one way to mitigate these potential risks and secure the success of the project is to do an efficient analysis and risk identification. The current, fundamental theory, when dealing with risk allocation, is to divide the potential hazards to the party who is best capable of managing it.<sup>101</sup> The different types of political pitfalls are normally allocated to the host government and its ministries. Conversely, commercial risks are generally transferred to the private and the insurance sector when associated with the construction and operation of the project.<sup>102</sup> Hence the conflict of interest between the public and private participants. The public sector is reluctant to take over financial risks and private enterprises must limit their commercial and political risks. Due to the different interests of the parties involved, there are alternative methods in managing these perils.

#### 5.4.1.1 Sovereign Guarantees

In considering whether to allot funds to projects based on concession agreements, investors look to minimize the impact of non-commercial risks associated with such financings.<sup>103</sup> An investor should initially make sure that the host government will provide a sovereign guarantee that it will use its best efforts to see the project through to completion or even provide protection against expropriation and tax reassessments. While sovereign guarantees may be difficult to enforce, they are an investor's best protection against political risks. An alternative to the sovereign guarantee, clearly not enforceable but a more gentle approach, is to have the government sign a statement that it will protect the project from ad hoc legislation that may affect the project's economic viability in a negative way. Within the FIL 2000, the Vietnamese government guarantees that all foreign capital investors will receive a 'fair and equitable treatment' and the capital and lawful assets will not be expropriated or nationalized by governmental authorities or enterprises.

#### 5.4.1.2 Limited-recourse and Joint Ventures as Hedging

In the quest for further effective mitigation strategies, the participants may also choose to avoid proceeding with the project on a non-recourse basis and as an alternative utilize the more secure limited-recourse method.<sup>104</sup> This provides comfort to the lenders and as a result, the interest rates and the capital funding cost may decrease.

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<sup>101</sup> Stewart-Smith, M., 'Private Financing and Infrastructure Provisions in Emerging Markets', *Law and Policy in International Business*, 1995, p.7.

<sup>102</sup> Zhang, N', 'Moving Towards a Competitive Electricity Market? The Dilemma of Project Finance in the Wake of the Asian Financial Crisis', *Minnesota Journal of Global Trade*, Summer 2000, p.3.

<sup>103</sup> Labadi, W., 'A Favourable Concessions Regime: A Lenders Perspective and Perceptions from Transition Countries, Part 2', *Butterworth's Journal of International Banking and Financial Law, BJIBFL*, vol. 16, o 7, p. 321, July/Aug 2001.

<sup>104</sup> Stewart-Smith, M., 'Private Financing and Infrastructure Provisions in Emerging Markets', *Law and Policy in Int. Business*, 1995, p.7.

In order to further spread risks and pool financial, technological and security resources, a joint venture between the project company and the local company and suppliers may be established. Host governments are keen on this cooperation, because they gain an increased control level and ensure extensive local participation. The joint venture also ascertain participation by local suppliers and employees by providing the manufacturing facilities and labour, while the foreign partner provides technology and investment capital. A project consisting of both foreign and local participants is less vulnerable to political mood swings, under the assumption that the local party will not turn against the foreigner.

#### 5.4.1.3 Dispute Resolution and Stabilization Clauses

Theoretically, an investor should require a dispute resolution clause in the contract stating that potential disputes should be solved by international arbitration under the UNCITRAL Rules or the International Centre for Settlement of Investment Disputes (ICSID) Rules. However, in the case of Vietnamese counter-parties, empirical experience shows that there is a fundamental discrepancy between the theoretical way of doing business and the way it ‘really works out there’.<sup>105</sup> Another technique to control the legal powers of a state party is to use stabilization clauses in the contracts. The foreign investor should definitely seek a stabilization clause as a guarantee, ensuring against nationalization of the project prior to the project natural due time. The stabilization clause should clearly define what constitutes a nationalization, if creeping and direct expropriation is also to be comprised by this definition and if liquidated damages are to be recovered in the case of a breach.<sup>106</sup>

#### 5.4.1.4 Local Expertise

A foreign business partner should not underestimate the value of a local, experienced, Vietnamese, legal counsel, familiar with the specific political and commercial risks associated with the Vietnamese market. Foreign lawyers are not permitted to practise or give advice on Vietnamese legal issues.<sup>107</sup> Legal advice in conjunction with the other risk management methods purposed *supra* is definitely the preferential way of doing business investments in Vietnam.

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<sup>105</sup> Interview with Mr Eric Rydgren, President & Country Manager, ABB Vietnam, 041006. See further concerning dispute resolution in chapter six.

<sup>106</sup> Paasivirta, E., *Participation of States in International Contracts and Arbitral Settlement of Disputes*, Lakimiesliiton Kustannus, Finnish Lawyers’ Publishing Company, Helsinki, 1990, p.161-162.

<sup>107</sup> Trang, D.V., ‘The Practice of Law and Foreign Investment in Vietnam’, *Whittier Law Review*, 2001, p.2.

#### 5.4.1.5 MIGA Insurance

If the above enumerated ways of mitigating and hedging against risks prove to be ineffective, there is one last alternative for the foreign investors. The World Bank has set up the Multilateral Investment Guarantee Agency (MIGA) to provide insurance to foreign investors seeking to invest in developing countries. The objective is to encourage FDI and to offer an insurance that commercial insurers are unwilling to offer to a foreign investor, because the risks associated with these countries are so unpredictable and capricious.<sup>108</sup> MIGA's insurance even covers contractual breach and includes undertakings given under a stabilisation clause.

### 5.5 Concluding Remarks

Given all the risks enumerated *supra* and the capital, expertise and long-term commitment a typical project financing requires, the conclusion is that it is only the largest and most sophisticated foreign companies or joint ventures within the infrastructure arena that may compete in an efficient way. They have the expertise, advanced technology and the human resources. After considering the contractual allocation, avoidance and mitigations of the risks and the potential hazards, they have the prerequisites to be successful and reliable actors on the BOT playing field. Moreover, commercial banks seem to be more willing to provide loans for a private project company to finance a project, than they would be to loan money directly to a government. Developing countries need stable, strong-minded investors that are in it for the long-run.

After the Asian financial crisis in 1997, the investors withdrew from the Asian market and became more sensitive to political, legal and currency risks. The lack of predictability and stability tended to make the participants insecure and unwilling to jeopardize their assets. In spite of that, there is today a decisive will among foreign capital investors and companies to invest in Vietnam '*before it's too late*'<sup>109</sup>. The market of Vietnam is influential, hungry and "up and coming" and the risks associated with this market can be sufficiently mitigated by proper planning and constructive communication among the participants. If played correctly, with a proper understanding of the legal and economic risks that may arise when utilizing a BOT arrangement, project finance can serve as a vehicle, which creates a 'win-win' situation for all parties.<sup>110</sup> Nonetheless, the profits in Vietnam are not in any way guaranteed; as the potential returns increase, so do the incremental various risks.

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<sup>108</sup> Loke, A.F.H. 'Risk Management and Credit Support in Project Finance', Singapore Journal of International and Comparative Law, 1998, p. 7.

<sup>109</sup> Interview with Mr Eric Rydgren, President & Country Manager, ABB Vietnam, 041006.

<sup>110</sup> Mr. Eric Rydgren, President and Country Manager at ABB, agrees with this conclusion and considers foreign direct investment in Vietnam's emerging capital market is a 'win-win situation' if played and mitigated correctly in conjunction with an understanding of the local culture and the differences between the participants.

# 6 Commercial Dispute Settlement

## 6.1 Introduction

The world of today is in many ways increasingly globalised, a fact frequently discussed in media. It is perhaps easy to assume that this convergence also comprises matters of business and law. Certainly legal consequences of globalisation can be pointed out, for instance an increase in multilateral treaties, conventions and agreements within organisations such as the WTO, the EU, APEC and ASEAN; there are more changes to domestic law as a result of international and regional obligations, and the demands posed by the commercial multinationals on domestic law reform, explicitly and implicitly, are beginning to show both in theory and in practice. However, there is no clear trend to this effect, as of yet, in Asian countries.

Superficially, there are signs that the region is adapting to this aspiring Western all-comprehensive modern legal culture, particularly in commercial settings. One example is the commitment made in the last round of ministerial talks within APEC to strengthen Asia's capacity to deliver and maintain means of commercial dispute resolution; this undertaking was incorporated as part of APEC's work program.<sup>111</sup> In Vietnam, as in many other Asian countries, great efforts are being made to bring the legal education up to date. There is also evidence of a certain degree of standardisation of commercial documentation and practice for some transaction types, mainly in the more commercially developed countries in the region. A more thorough look at the state of things, however, will reveal that many Asian countries, especially those of a Socialist constitution, such as Vietnam, are still, in practice, going very much as a one-state concern, despite appearances.

With regard, again, to the issue of commercial dispute resolution, Vietnam is most definitely rather an untried card, so to speak, as far as commercial dispute resolution goes. Foreign investors must calculate with this risk, since it is most certainly a major issue from a presumptive investor's perspective when entering into an emerging market, in addition to the concern with to which extent laws are implemented, or whether or not, and to what extent, laws are also enforced and enforceable, if immediate access to dispute settlement is at hand. Such awareness is perhaps particularly important in the context of BOT-projects, seeing as how the complexity of the contract structure, the amounts of money generally involved and the somewhat precarious situation when one of the parties to the disputed contract may be the government of the state where the dispute is to be

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<sup>111</sup> Pryles, M.(ed.), *Dispute Resolution in Asia* (2nd edition), 2002, Kluwer Law International, the Hague, p. 18.

settled, call for the availability of a fully-fledged legal system, not least in the respect of dispute resolution.

Appropriate notices thus given, matters in Vietnam have developed sufficiently since the introduction of the *Doi Moi*, or ‘open door’, reform policy in December of 1986 to permit one to speak of an increasingly coherent system of adjudicating commercial disputes.<sup>112</sup> One must keep in mind, however, that reform of the system for dispute resolution and enforcement is still underway, and when some organs only reluctantly accept the new order of things, other organs are unable to perform their new tasks because of a lack of training and other resources.<sup>113</sup> Within the mechanism of the former centrally planned economy of Vietnam, the regulatory framework for settling economic disputes was rather simple. The occasional commercial dispute was resolved either by means of the so-called ‘state economic arbitration’, performed by governmental bodies at central, provincial and district levels, or administratively, except where foreign parties were involved, such international disputes mainly being international trade disputes with other Socialist countries. Adjudicative tasks of state economic arbitration bodies were primarily conciliatory in nature.<sup>114</sup> This system was dissolved in 1994.<sup>115</sup> A survey of dispute settlement by means of alternative dispute resolution and arbitration in a Vietnamese context will be given below.

Focusing on the resolution of commercial disputes within the public court system, i.e. the People’s Courts, it is only to be observed that courts have long been under the Party’s and the government’s factual influence. Gradually, however, courts are gaining a more independent status, at least under law.<sup>116</sup> The Constitution maintains the explicit duty of the courts to actively protect Socialism, but it is also stipulated that the courts are to: ‘...protect the lives, property, freedom, honour and dignity of citizens’.<sup>117</sup> It is also stressed that ‘The verdicts and decisions of the People’s Courts which have already taken legal effect must be respected by state organs, social and economic organisations, people’s armed forces units and all citizens; persons and units concerned must strictly implement them’.<sup>118</sup> Still, it is very much to be recommended any foreign investor to include an arbitration clause in all agreements, although by establishing the Economic Courts, Vietnam has clearly indicated its commitment to make dispute resolution between foreign and Vietnamese business partners more accessible and reliably impartial. In fact, there is a conscious attempt made

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<sup>112</sup> *Ibid*, p. 378.

<sup>113</sup> Gutterman, A. & Brown, R. (eds.), *Commercial Laws of East Asia*, 1997, Sweet & Maxwell Asia, Hong Kong, p. 640.

<sup>114</sup> Schot, A.C. M. J., *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 351.

<sup>115</sup> Duy Nghia, P., *Vietnamese Business Law in Transition*, 2002, Thế Giới Publishers, Hanoi, p. 393.

<sup>116</sup> Gutterman, A. and Brown, R., *Commercial Laws of East Asia*, 1997, Sweet & Maxwell Asia, Hong Kong, p. 641.

<sup>117</sup> See Chapter X, Article 126 of the Constitution.

<sup>118</sup> See Chapter III, Article 31 of the Constitution.

by the government to transfer economic disputes to the public court system.<sup>119</sup> An overview of the path of the commercial dispute through the public system is included *infra*.

## 6.2 The Concept of ‘Commercial’ under Vietnamese Contract Law

On the whole, Vietnamese rules on which issues are to be considered commercial, or economic, which is the term used in the relevant Vietnamese legislation, differs from international norms in certain important respects. This is a matter for prospective investors to consider, since it may have a bearing on which tribunal or body will assume jurisdiction over it.

In Vietnamese contract law, the ‘parole evidence-rule’ is sacrosanct. The purpose of the agreement has to be set out in the contract, in a way that will satisfy the criterion of the contract’s economic objective. All economic contracts have to be in writing in order to be enforceable; there are no legally recognised concepts of oral or implicit contracts, much less binding such. Under the Civil Code, however, an oral agreement may form a civil contract.

Another obligatory criterion for an economic contract is the specific legal status of the parties. Only legal entities, a shareholder of a company or an individual with a business registration can be parties to an economic contract.

The specific features outlined above, which are essential for a contract to be legally considered an economic contract, naturally cannot always be present in an agreement. Contracts that do not meet the standards set for an economic contract, may instead be considered civil contracts, and as such open to be adjudicated by a Civil Court. Although this would probably be better than a dismissal of the case, it is to be kept in mind that the commercial acumen of the judiciary in the Civil Courts may not be even comparable to that of the Economic Courts. There are a number of other important respects in which the civil and economic procedure vary, *inter alia* the make-up of the bench at first instance, level and payment of court fees, and, significantly, time limits and limitation periods.

Another important point of difference between international and Vietnamese contract law in this particular respect concerns contract invalidity. An economic contract is invalid in its entirety not only if its object is illegal, *pactum turpe*, but also if one of the parties have not registered, in accordance with the law, the business which is to carry out the task agreed upon in the contract. This emphasizes the importance of verifying that future partners’ business registration documents are as they should be before

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<sup>119</sup> Schot, A. C. M. J., *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 360-361.

entering into contractual agreements with them. An agreement is also wholly invalid should it be signed by a person who does not have the proper authority to sign it or if the contract is signed fraudulently. The right person to sign a contract is the person who is the legal representative of the legal entity in question, or the registered owner of a business. Additionally, although a legal entity or a registered owner of a business may authorise another person to sign economic contracts on the principal's behalf, this power cannot be transferred further. Any delegation of this kind has to be in writing. In case of breach of contract, the Ordinance on Economic Contracts gives provisions for damages, but it is uncertain which principles to apply for the application of these provisions.<sup>120</sup>

### 6.3 Structure of the Dispute Settlement System – an Outline

The Vietnamese commercial dispute resolution system as it appears today may be traced to the earlier three-tier non-governmental arbitration system created to handle international trade disputes in the beginning of the 1960s. The State Economic Arbitration Council (SEAC), founded in 1960 by the government, which also appointed all SEAC arbitrators, was set up to handle all domestic Vietnamese disputes between state-owned enterprises. The Maritime Arbitration Committee (MAC) and the Foreign Trade Arbitration Committee (FTAC), established in 1963 and 1964 respectively, fell under the rubric of the Vietnam Chamber of Commerce and Industry; their area of expertise were disputes concerning maritime law and international trade.<sup>121</sup>

With the growth of investment brought by the *Doi Moi* in the early nineties, however, a reorganisation of this system became inevitable. The State Council remodelled the old SEAC by creating new, smaller 'State Arbitration Bodies', which were supposed to function on national, regional and district levels, but this system soon became abolished too, during the restructuring of the domestic tribunals in late 1993, and was replaced with the current system of Economic Courts, which came into existence on July 1, 1994. Today these Economic Courts are an integrated part of the 'ordinary' judicial system and are under the control of the People's Courts (comparable to English Commercial Courts or French *Tribunaux de commerce*), although they are supposed to be set up so as to be partially independent, according to the stated.<sup>122</sup>

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<sup>120</sup> Duy, N.P., *Vietnamese Business Law in Transition*, 2002, Thê' Giói Publishers, Hanoi, p. 296-322 and Pryles, M.(ed.), *Dispute Resolution in Asia* (2nd ed), 2002, Kluwer Law International, Hague, p. 381-382.

<sup>121</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd ed), 2002, Kluwer Law International, the Hague, p. 382.

<sup>122</sup> See the Law on the Organisation of the People's Court of the 6 October, 1992, as amended on 28 December 1993 and 28 October 1995.

The consequence of this reorganisation was a blank space in the Vietnamese judicial system, in that there was no arbitral instance to handle disputes arising between state-owned companies. Therefore, in September of 1994, Economic Arbitration Centres were established<sup>123</sup> and consigned with the statutory power to settle a) disputes arising from an economic contract, b) disputes between shareholders concerning the establishment, operation and dissolution of a company and c) disputes relating to equity and bond trading. EAC rules, which will be discussed *infra*, are very similar to those of the Vietnam International Arbitration Centre (VIAC). The EACs field of competence also comprises disputes involving foreign elements.<sup>124</sup> In April of 1993, the FTAC and the MAC were merged to form the VIAC, a non-governmental arbitral institution with the authority to resolve ‘disputes arising out of international economic relations, such as foreign trade contacts and those concerning investment, tourism, international transportation and insurance, transfer of technology, services, international credits and payments, etc.’<sup>125</sup> Since 1996, the jurisdiction of the VIAC has been broadened to encompass all economic disputes submitted to the Centre by the parties to a dispute, instead of being limited solely to economic disputes involving foreign elements.<sup>126</sup>

It may be worth noting that although there does not appear to be any formal hindrance in this respect, foreign or international arbitration organisations have refrained from setting up in Vietnam; there might be a possibility for the creation of a domestic entity by the LCIA (the London Court of International Arbitration), a national committee by the ICC (the International Chamber of Commerce) or suchlike.

## 6.4 Litigation

### 6.4.1 Economic Courts

#### 6.4.1.1 Rules on Jurisdiction – Competence

The rules as to the subject-matter jurisdiction of the Economic Courts are simply stated; they have the right to determine disputes regarding commercial, or ‘economic,’ contracts, as the local terminology would have it. In practice, this means that Economic Courts handle cases concerning - besides the more straight-forward economic contract-cases – company law, industrial property, securities, unfair competition and bankruptcies. The

<sup>123</sup> See Government Decree No. 116/CP of September 5, 1994, implemented by Prime Minister Decision No. 114/TTg.

<sup>124</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 382 and Duy Nghia, Pham, *Vietnamese Business Law in Transition*, 2002, Thế Giới Publishers, Hanoi, p. 393-396.

<sup>125</sup> See Prime Minister Decision No. 204/TTg of April 23, 1993 and Article 2 of the Arbitration Rules of the VIAC.

<sup>126</sup> Pryles, M.(ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 383 and Duy, N.P., *Vietnamese Business Law in Transition*, 2002, Thế Giới Publishers, Hanoi, p. 393-394.



classification of what exactly constitutes an economic contract under Vietnamese law is not necessarily straightforward, though, and may involve examining the purpose of the contract and the nature of the signatories thereto. In the Ordinance on Economic Contracts of September 25, 1989, an economic contract is defined as ‘an agreement [relating] to production, exchange of goods, provision of services, research and application of scientific know-how’.<sup>127</sup> According to this definition, commercial activities of representative offices would not fall under the jurisdiction of the Economic Courts, seeing as how a representative office is not entitled under Vietnamese law to do business *per se* in Vietnam.<sup>128</sup>

The subject matter jurisdiction of the Economic Courts is set out in § 12, Economic Disputes Ordinance, as comprising a) disputes between members of a company regarding the establishment, operation and dissolution of the company, b) disputes relating to the purchase and sale of stocks and bonds and c) other disputes as stipulated by law.

The personal jurisdiction of the Economic Courts encompasses those persons able to conclude an economic contract, that is ‘legal entities’, individuals with a business registration as defined by law or shareholders of a company (if the dispute at hand concerns any issue mentioned at a) *supra*).<sup>129</sup> Companies are in general considered legal entities under Vietnamese law, although the legal status of sole proprietorships is somewhat vague. As is mentioned above, the contract will be considered invalid, if one of the parties has not registered the business which is to carry out the task agreed upon as stated in the contract, regardless of it having an economic object or not. Should the contract not involve legal entities at all, it does not come under the ambit of the Economic Court; the matter will be heard by the Civil Court, whether having an economic purpose or not.<sup>130</sup>

The territorial jurisdiction of the Economic Court is based on where the defendant is located or resides. In certain circumstances, however, the applicant may refer the matter to another court, for instance, at the location where the event leading to the dispute occurred.<sup>131</sup>

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<sup>127</sup> Pyles, M. (ed.), *Dispute Resolution in Asia* (2nd ed), 2002, Kluwer Law International, the Hague, p. 383. The exact article of the Ordinance is left out, since the original text could not be consulted.

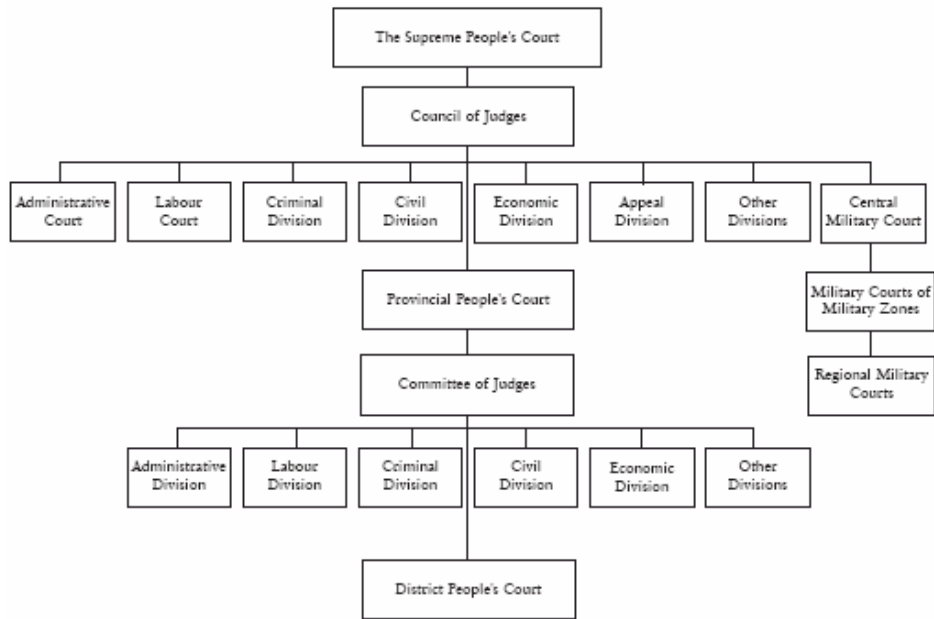
<sup>128</sup> On the other hand, the Contracts Ordinance, in principle, applies to all economic contracts signed and to be performed in Vietnam, including those to which one of the parties is foreign.

<sup>129</sup> Pyles, M. (ed.), *Dispute Resolution in Asia* (2nd ed), 2002, Kluwer Law International, the Hague, p. 384, Ordinance on Economic Contracts of September 25, 1989 and § 12, Ordinance on Procedures for Settlement of Economic Cases.

<sup>130</sup> Pyles, M. (ed.), *Dispute Resolution in Asia* (2nd ed), 2002, Kluwer Law International, the Hague, p. 384.

<sup>131</sup> Schot, A.C. M. J., *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 356-357.

## Structure of the Court System



### 6.4.1.2 Jurisdiction in International Dispute Resolution

Article 87 of the Economic Disputes Ordinance provides that the resolution of economic disputes in Vietnam, where one or both parties are foreign, may be carried out in Vietnamese courts subject to the Ordinance, unless otherwise stipulated by international conventions to which Vietnam is a party. Those cases involving foreign parties handled in Economic Courts are defined under the Supreme Court's Letter 11<sup>132</sup> in the same way as domestic cases and include cases relating to foreign investment.

In Article 43 of the Economic Disputes Ordinance, it is stated that the Ordinance is applicable also in the respect of execution and/or enforcement of economic contracts to which one of the parties is a Vietnamese legal entity and the other party is a foreign legal entity or individual. Letter 11 offers the following interpretation of this article.

- Regardless of the location of the foreign party's headquarters or domicile, disputes arising from the economic contract in question may be referred to Vietnamese court for adjudication.
- Contracts will not be considered economic contracts in cases where either both parties are foreign legal entities or individuals, or where the Vietnamese party is a Vietnamese individual, which includes a 'registered business person', i.e. the Vietnamese contract party must be a legal entity.

<sup>132</sup> Official Letter 11/KHXX of 23 January 1996.

The Supreme Court's Letter 11 may prove an important lodestar for the construction of Vietnamese legal texts concerning these issues, considering that it was established in an earlier Circular<sup>133</sup> ('Circular 108') that an agreement between a Vietnamese legal entity and a foreign entity or individual could not be considered an economic contract in cases where the foreign party had no legal presence in Vietnam. Hopefully, the change of policy shown in Letter 11 will be confirmed in subsequent legislation, as The Supreme Court's Letter remains interpretation guidance of sorts, and the point most definitely is important to foreign actors on the Vietnamese market.

In short, whether or not a case will be brought before Economic Court rather than Civil Court depends on the legal status of the domestic contract party; the objective of the relevant agreement has no real importance in the assessment, when one of the contract parties is a foreign entity. Obviously, this is the case regardless of provisions in the Economic Dispute Ordinance to this respect. Some sources<sup>134</sup> indicate that all cases involving foreign parties generally fall under the scope of the Economic Dispute Ordinance, but the most recent and more detailed accounts of the procedure under the Ordinance defines its ambit as described above.

It is to be noted, that the first instance resolution of cases where a foreign party is involved is undertaken only by provincial, or city, courts, and not district courts.<sup>135</sup>

### 6.4.1.3 Exclusion of Jurisdiction in Commercial Disputes

#### 6.4.1.3.1 In General

The exclusion of the Vietnamese court's jurisdiction may arise – as a matter of practice and on the basis of Article 87 of the Economic Disputes Ordinance – if the disputed contract specifies a foreign court as forum for adjudication, and/or the subject matter of the dispute lies abroad. It should be noted that this principle is not explicitly stated anywhere in Vietnamese law; rather, it is simply applied in practice.

Another possible ground for exclusion of jurisdiction is given in a provision in an Inter-Branch Circular<sup>136</sup> issued by the Supreme Court in early 1995. In this piece of legislation, Article III4(c), it is stated that 'where the economic contract, signed in Vietnam or abroad, is implemented in part in Vietnam and in part abroad, the Court shall in the event of a dispute adjudicate only that part of such dispute arising in Vietnam'. Whether or not this applies

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<sup>133</sup> Circular 108/TT/PC of May 1990 on State Arbitration.

<sup>134</sup> See for example Gutterman, A. and Brown, R (eds.), *Commercial Laws of East Asia*, 1997, Sweet & Maxwell Asia, Hong Kong, p. 642.

<sup>135</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, pp. 384-385.

<sup>136</sup> Circular 04/TTLN of 7 January, 1995, guiding the implementation of some provisions of the Economic Disputes Ordinance.

even where the parties have expressly submitted the entirety of their dispute to Vietnamese courts it not clear, but such would appear to be the implication. As of yet, this principle has not been applied; it is impossible to say if and in that case, how, it might be applied.

According to practice in the Supreme People's Court, Vietnamese courts have no jurisdiction over disputes concerning foreign land. While reservations have sometimes been expressed where both parties are Vietnamese, which is seldom the case, no judgement regarding foreign land has yet been rendered by a Vietnamese court.<sup>137</sup>

#### **6.4.1.3.2 Forum Agreements**

The parties to a contract may, upon their own agreement, autonomously determine the court or arbitration institution of their choice for the resolution of their disputes, beforehand, perhaps as a arbitration clause incorporated in the contract in question, or in a separate agreement at the time of the dispute. However, once it is agreed to refer a matter to the Vietnamese courts, the choice of jurisdiction between the civil or economic courts is not a matter to be decided by the parties. The parties may select a foreign court as forum for their disputes, but normally, this choice will be disregarded by the judiciary where no 'foreign element' is present, i.e. where both parties and site of contract are Vietnamese. An exclusion agreement should be clearly stated in the contract or in a separate agreement. In the absence of an exclusion agreement, the courts will prevail over any arbitral institution, and Vietnamese courts over foreign courts.<sup>138</sup>

#### **6.4.1.3.3 Non-Exercise of Jurisdiction**

The two doctrines of *lis alibi pendens* and *forum non conveniens* – the discretionary power of a court to decline jurisdiction, when it gains knowledge of the fact that the matter is already being tried elsewhere, or that the matter would be more appropriately tried elsewhere – are not widely recognised by Vietnamese jurists, presumably due to a competing notion that it is the duty of any court to exercise its jurisdiction whenever jurisdiction is properly attained.

Conflicts of jurisdiction are to be determined by the Supreme Court, as provided in Article 16.2 of the Economic Disputes Ordinance; pending the resolution of a jurisdictional conflict, a stay of the proceedings will be granted, in practice, by the court handling the matter. In cases involving foreign elements, however it is practice to continue to hear the case until the Supreme Court grants a stay.<sup>139</sup>

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<sup>137</sup> Pryles, M., (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, pp. 387-388.

<sup>138</sup> *Ibid*, p. 388.

<sup>139</sup> *Ibid*, p. 388.

#### 6.4.1.3.4 Choice of Law in International Litigation

Where procedure is concerned, the principle of *lex fori* is comprehensively accepted in Vietnam, the applicable law accordingly being Vietnamese law. With respect to the substance of the litigation, the parties are usually free to agree upon the applicable law, except for some cases, for instance where real property located in Vietnam is involved, then, Vietnamese law is applicable pursuant to the principle of *lex rei sitae*.

As far as choice of law rules are concerned, there seems to be no specific regulation for economic disputes, but the general rule, as stated in Article 828 of the Civil Code, is that foreign laws and/or international custom may only be applied so long as this is not contrary to basic rules of Vietnamese law. This rule encompasses all Vietnamese courts.

The principle of *lex voluntatis* is upheld under Vietnamese law, which renders it possible for parties to have the law of their choice applied to any future dispute that might arise between them, simply by incorporating a choice of law-clause into their agreement. Two exceptions to this general principle of party autonomy should be noted: a) where the contract is signed and performed entirely in Vietnam; and/or b) where the contract relates to immovable property situated in Vietnam. In the absence of a choice of law-clause, Vietnamese law and practice prescribes that the contract's forum is governed by *lex loci contractus*, the parties' rights and obligations by *lex loci actus* and the procedure for settling the dispute by *lex fori*.

Worth noting, however, is that the Vietnamese judiciary tend not to be especially familiar with international commercial matters, which prompts an almost universal inclination to have recourse to Vietnamese law and practice in all matters.<sup>140</sup>

#### 6.4.1.4 The Proceedings

The dispute at hand will be heard at first instance in the Economic Court division of the local (provincial, where a foreign party is involved, otherwise district) People's Court, following the rules in the Economic Dispute Ordinance. As was said *supra*, jurisdiction is normally based on the business location or residence of the defendant, or, if the dispute concerns immovable property, the location of the property. Should the matter exceed 4 500 USD (or 50 million VND) and/or do not involve a foreign party, the District Court has no jurisdiction (see above). The Economic Court is also forum for bankruptcies.<sup>141</sup>

Both legal persons and individuals are entitled to initiate proceedings in connection with an economic dispute, 'to protect their legitimate rights and lawful interests'<sup>142</sup>, by filing a writ. It is to be noted, though, that the

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<sup>140</sup> *Ibid*, p. 389.

<sup>141</sup> *Ibid*, p. 385.

<sup>142</sup> See Article 1, Economic Disputes Ordinance.

statutory limitation period for filing a lawsuit applicable to all commercial transactions is two years from the date on which the right to lodge a claim arises<sup>143</sup>. This date is the date of delivery with respect to claims relating to the quantity of goods, the date of expiry of warranty where the claim concerns the quality of goods, or the date stipulated for the fulfilment of the party's obligations for all other claims<sup>144</sup>.

The writ will be rejected where:

- it is not filed within six months of the date on which the dispute arose;
- the court considers the applicant's claim to be invalid;
- the case has already been decided by another court or authorized body, i.e. *res judicata*;
- the case does not fall within the jurisdiction of the court; or
- the parties have already agreed to resolve the issue by way of arbitration.

When handling economic cases, the Economic Court will, first thing, propose a conciliatory arrangement. Only if conciliation fails will the Court proceed with a preliminary public hearing of the case. The proceedings are open, unless the dispute involves state secrets or the court otherwise decides to hear the matter in closed court. Therefore, a party cannot legally request that a matter involving for example trade or technology secrets be heard behind closed doors. All proceedings are held in Vietnamese, but litigants may argue in their own language through an interpreter.

The bench is composed of two professional judges<sup>145</sup> and one lay assessor, as opposed to the composition in ordinary civil cases, where the composition is reversed<sup>146</sup>. Both parties are entitled to challenge any member of the bench should there be a reason to assume he or she cannot decide on the case neutrally or without bias<sup>147</sup>.

During the process, parties, or the State Prosecutor<sup>148</sup>, may apply for temporary measures such as the blocking of bank accounts, prohibiting or allowing certain transactions, or the securement of evidence. Regarding obtainment of evidence abroad, it should be noted that Vietnam is not a signatory to any multilateral conventions in this respect, and Vietnamese law is silent on this issue. Some bilateral conventions exist, relating almost exclusively to former Eastern Block nations. Within three days from the

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<sup>143</sup> See § 242, the Commercial Law.

<sup>144</sup> See § 241, the Commercial Law.

<sup>145</sup> A significant change introduced in the new Constitution in 1992 is that persons appointed as professional judges must have a law degree.

<sup>146</sup> See §§ 41-42, Economic Disputes Ordinance.

<sup>147</sup> See §§ 18-19, Economic Disputes Ordinance.

<sup>148</sup> Unlike the procedural situation in other countries, the Vietnamese State Prosecutor has the right to participate in any stage of the litigation before the Economic Court, 'if necessary', according to § 28 of the Economic Disputes Ordinance. This element of state control may be abolished with the enactment of the new Code on Civil Procedure, however.

date of request of an interim measure, the court will make its decision on whether or not to take the action indicated, and the court's measures, if any, will come into effect immediately. Depending on circumstances, the Court may also order interim measures *ex officio*. Full legal representation is allowed, and in addition, parties may request the Court to appoint experts in order to assist and advise where technical matters are concerned, and to summon witnesses.

The interpretation of laws, other regulations and contracts is sometimes arduous, due to the lack of preparatory works from the legislator, case law and commentaries. Furthermore, the concept of precedent is virtually non-existent. This prompts the courts to construe laws and contracts word for word, which ensures a certain degree of predictability. The principle of sanctity of promise in commercial relationships is generally upheld, and the courts seldom tend to find any distinction between the meaning of the words and the actual intent or purpose behind a law or a contract, in a way similar to the common law doctrine of 'parole evidence'.

The rather strained time-limits employed in Vietnamese legal procedure might be quite problematic, especially considering that Vietnam is a country where it is customary for parties to make a serious attempt at conciliation before turning to any formal instance. In economic cases, moreover, the time-frame is somewhat accelerated compared to the civil procedure.<sup>149</sup> Proceedings must be brought within six months of the disputed action. The court may entertain a request for an extension of time, provided the request is made before the expiration of the relevant time-period. As is perhaps gathered, it might be difficult to establish exactly the date when a dispute is deemed to have arisen. In most cases, however, the defendant considers this date as the date the applicant became aware of the breach of contract<sup>150</sup>. Another problem may possibly be envisaged in connection with the somewhat complicated rules of jurisdiction of the various tribunals in Vietnam; a party may bring the proceedings before the wrong tribunal and then find itself time-barred from remedying the situation.

Some benchmarks as to the different time-limits may be given, as set out in the Economic Disputes Ordinance. Once the court fee has been paid,

- the court will enrol the case for hearing, and, within ten days thereafter, notify the defendant of the proceedings;
- the defendant is required to file its defence within ten days after enrolment, which is indeed a very short period of time;
- within 40 or 60 days<sup>151</sup>, depending on the complexity of enrolment, the chairman of the college must notify the parties (and, if applicable, their respective lawyers) and the People's Prosecutor of its decision whether to suspend or postpone the case, or bring it to a hearing;

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<sup>149</sup> See Ordinance on Procedures for Civil Dispute Resolution of November 29, 1989.

<sup>150</sup> See Inter-Circular No. 04/TTLN of January 7, 1995, issued by the Supreme Court and the General Prosecutor.

<sup>151</sup> Four to six months in civil cases.

- proceedings then must commence within ten to 20 days, depending on the complexity of the case<sup>152</sup>.

Any appeal against the decision of an Economic Court has to be lodged by the parties, or the State Prosecutor, within the rigid time scheme of ten days<sup>153</sup>, following the decision of the court. It is to be noted that the time period starts the moment the court reaches its decision, and not upon the parties' receipt thereof. As it may easily take as much as up to seven days before a decision is received, this might leave very few days to translate and review it. The time constraint for framing an appeal is accordingly extremely short, when compared to most Western jurisdictions.

If a dispute has the provincial Economic Court as its first instance, the Economic Court branch of the Supreme People's Court is the next and final appellate body (if the first instance is the district People's Court, the second instance, naturally, is the provincial People's Court). The judgements of the Supreme People's Court are not published or otherwise regularly made available in print. There is also a possibility that a case may be submitted to review *ex officio* by higher courts or representatives of the Procuracy<sup>154</sup>, although the use of this review option in civil cases is prudent and on the decrease, particularly with cases settled by higher courts. Grounds for this form of review are: serious procedural errors, a grave mistake in the application of law, or that the judgement differs considerably from what should objectively be derived from the facts of the dispute.

## 6.4.2 Recognition and Enforcement of Foreign Judgements and Awards

As a consequence of Vietnam's greater involvement in international trade, enforcement of decisions from foreign courts and tribunals is increasingly requested. Vietnam is a party to a number of bilateral and multinational agreements on mutual judicial assistance. The 1989 Ordinance on Enforcement of Civilian Court Verdicts<sup>155</sup> stipulates that the verdicts given by foreign tribunals that have been sanctioned by Vietnamese courts shall be executed in Vietnam; this provision, however, has had little effect in practice, seeing as how proceedings for the enforcement of such decisions are virtually unknown. A Vietnamese Court will only recognise: a) court awards of a country with which Vietnam has signed a bilateral treaty concerning the mutual recognition and enforcement of judgements (only a few of these treaties exist, primarily with Eastern European countries), or which is a member of an international convention signed by Vietnam, regarding the recognition and enforcement of foreign court decisions

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<sup>152</sup> One or two months in civil cases.

<sup>153</sup> 15 days in civil cases.

<sup>154</sup> Only a few authorised persons have the right to apply for these proceedings, such as the General State Prosecutor and Chief Judges of the provincial Economic Courts. See Article 74, Economic Disputes Ordinance.

<sup>155</sup> This Ordinance was made obsolete with the enactment of the 1995 Ordinance.



(Vietnam not having signed any such convention yet); and b) decisions which are required to be recognised by Vietnamese law (the meaning of which remains unclear).

The later Ordinance on the Recognition and Enforcement of Foreign Arbitration Awards and Civilian Decisions within Vietnam<sup>156</sup>, following Vietnam's accession to the 1958 New York Convention on the 12 of September 1995, attempts to remedy some of the problems experienced with the earlier piece of legislation, by empowering Vietnamese courts and tribunals to examine petitions to enforce or reject decisions by foreign instances. Requirements, procedures and general principles on recognition and enforcement of foreign arbitral awards are stated in the Ordinance. Under the Convention, significant references to *lex forum* are made; for instance, recognition and enforcement of an award may in some circumstances be refused, as in those occasions set forth in Article 16 of the Ordinance, to be compared with their counterparts in Article V of the Convention. Grounds for non-recognition include: 1. lack of capacity on behalf of the parties to sign the underlying arbitration agreement or arbitral clause; 2. non-validity of the arbitration agreement under applicable law; 3. the respondent not having been given sufficient notice of the appointment of arbitrators or the arbitration proceedings or if he was otherwise unable to present his case; 4. the arbitral award having been set aside or suspended (presumably including awards which are not final, in the sense that appeal is still possible from the award); and 5. the fact that the subject matter of the dispute is not capable of settlement by arbitration under Vietnamese law. It is uncertain, however, how these principles will be applied in practice. In addition, Vietnamese courts are given discretionary powers to impose restrictions on the review of applications for recognition and enforcement of foreign arbitral awards in Vietnam, if Vietnamese arbitral awards or applications by Vietnamese parties for recognition and enforcement of Vietnamese awards in a foreign country are not entertained by the competent authorities in that country. Moreover, there is a general corollary to the Convention, stating that the Court may refuse recognition and enforcement if it considers this to be contrary to basic principles of Vietnamese law or the public policy. Again, the practical application remains to be seen.<sup>157</sup>

In simplification, recognition and enforcement may be permitted under the Ordinance a) if the award is obtained from an arbitrator of a country that has signed or acceded to a relevant international convention, *i.e.*, *inter alia*, the contracting states of the New York Convention; or b) on the basis of reciprocity without requiring the signing of, or the accession to, an international convention. The Ordinance does not, unfortunately so from the

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<sup>156</sup> Ordinance on the Recognition and Enforcement of Foreign Arbitration Awards and Civilian Decisions within Vietnam of September 14, 1995.

<sup>157</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, pp. 401-404 and Schot, A. C M J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 367.

prospect investor's point of view, provide for the direct recognition and enforcement of foreign arbitral awards. A Vietnamese court order granting it formal recognition and enforceability in the country is needed, appropriately obtained at a People's Court at provincial or centrally-governed municipalities, such as Hanoi, Ho Chi Minh City or Haiphong. It should be kept in mind that the Convention applies only to disputes arising out of 'commercial relationships', a term that as of yet has not been interpreted or defined under Vietnamese law.<sup>158</sup>

The enforcement of judgements is provided for in the 1993 Ordinance on Execution of Civil Judgements<sup>159</sup>. The governmental bodies principally responsible for the enforcement are the Enforcement Unit of the Provincial Department of Justice and the Enforcement Group of the District Department of Justice. The district Enforcement Officer, with possible police assistance, may employ forcible measures if a judgement cannot be enforced voluntarily. However, it is generally recognized that the Enforcement Units lack the necessary authority, as well as the material resources, to effectively fulfil their assigned tasks. For instance, the Enforcement Units do not have access to information on a person's or an enterprise's assets. Therefore, establishing new and strengthening existing institutions for the enforcement of arbitral and court awards is a matter of utmost importance.<sup>160</sup>

### 6.4.3 Concluding Remarks: Dispute Settlement in the Economic Courts

Prior to the introduction of the Economic Court system, all economic disputes had to be referred to the various economic arbitration bodies described above, under the provisions of the Ordinance on Economic Arbitration then in force. With the introduction of the Economic Courts, the role of these arbitral bodies were substantially reduced and understandably less favoured by litigants, presumably due to the fact that the arbitrators in question are public servants, appointed by the government. There are several openly admitted cases where private enterprises have been discriminated against state enterprises in disputes before state economic arbitration bodies. Also shortcomings of a procedural nature have been noted.<sup>161</sup> Even in those cases of state arbitration where the process is conducted in a perfectly

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<sup>158</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 402.

<sup>159</sup> Ordinance on the Enforcement of Civil Judgements of April 21, 1993.

<sup>160</sup> For sources on Economic Courts, see Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 383-386; Gutterman, A. and Brown, R. (eds.), *Commercial Laws of East Asia*, 1997, Sweet & Maxwell Asia, Hong Kong, p. 640-643; Duy N.P., *Vietnamese Business Law in Transition*, 2002, Thế Giới Publishers, Hanoi, p. 398-401 and Schot, Anne C M J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 356-362.

<sup>161</sup> United Nations Report, *An Introduction to the Vietnamese Legal System*, 1994, p. 63.

unbiased forum, the adequacy of state arbitration in disputes where state interests are concerned may be questioned.

For foreign parties, however, the dispute settlement in the Economic Courts offer no notable advantages compared to arbitration, at least not if the arbitration is handled by an independent international body. In fact, improvements in many areas are still needed in order for the dispute settlement process before an Economic Court to be a realistic alternative for the foreign investor. For instance:

- the lack of qualified and experienced judges remain and is likely to grow worse as the newly appointed judges might be less familiar with foreign practices and expectations than the former arbitrators of the Economic Arbitration bodies, which have not been recruited, due to the allegations of impartiality made towards them;
- still, there is no real independence of judges, as their decisions may be overruled; there is no effective separation of powers in this respect;
- the lack of qualified domestic counsel remains;
- laws and procedures continue to be unclear and inconsistent, especially from a foreign party's point of view;
- there is no jurisprudence or system for reporting cases on which a judge can base his or her decision; and
- enforcement agencies remain insufficiently equipped to enforce judgements.

As it is very probable that the number of cases submitted to resolution in Economic Court will continue to increase steadily, the minimum of improvement needed is judges and assessors with actual commercial experience, to give the system the credibility and efficiency necessary to enhance reliance on transactions on the Vietnamese market. After all, the goal of the *Doi Moi* policy is to open up for a more dynamic market, especially where foreign investment is concerned.<sup>162</sup>

## 6.5 Arbitration

### 6.5.1 Introduction

Subsequent to expropriation or breach of contract by a host state, an investor may have the right to institute arbitral proceedings against the host state. This right derives either from an agreement between the investor and the host state or a treaty between the host state and the investor's host state.

Arbitration is often the only forum for an investor to pursue legal remedies directly against the host state, since judicial proceedings in most cases do

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<sup>162</sup> Schot, Anne C M J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 360-361.

not constitute a viable option to use between a sovereign state and a national of another state. Some reasons why this is so are given in the following. For instance, lawsuits in a host state's court are often submitted in vain, due to pressure or even direct control exerted on the courts by the government of the host state. Lawsuits against the host state in the courts of another state are mostly unavailing as well, seeing as how a sovereign host state probably is highly unlikely to surrender to the jurisdiction of another state. Also, despite a few initiatives in the field, there are no international law courts that specialize in commercially orientated disputes; the International Court of Justice will only hear cases between sovereign states, or bodies that can be said to represent a sovereign state.<sup>163</sup> Private investors who are victims of expropriation by a host state, for example, will have to resort to arbitration.<sup>164</sup>

The general viewpoint in the doctrine may be held to be that arbitration as a means of settling disputes also holds some general advantages over litigation, especially on the international arena. Firstly, the proceedings between the parties are confidential, something that is often considered a very important factor in the commercial community, and which, in most jurisdictions, is not an option where litigation is concerned. Arbitration is also, as a rule, considerably less time-consuming than litigation. Formerly, arbitration has, as a rule, been thought to be a less costly alternative to litigation, due to the lengthy process in court, but this has been found to be a truth in modification in some cases. There are great expenses involved in setting up an arbitral proceeding, even if the matter at hand is taken before an established arbitral institution, rather than an *ad hoc* arrangement, such as arbitrator's fees and the fees charged by the arbitral institution for handling the dispute. Other advantages achieved by using arbitration, are that parties are able to avoid the necessity of abiding by service of process rules, and that they may engage the counsel of their choice, with documented experience of practicing on an international level. Parties are also better able to select a person knowledgeable and well-acquainted with the issues in question to hear the disputed matter. One additional advantage of arbitration is that it offers parties great scope to structure as they see fit their dispute settlement procedures. Their decisions on such procedures will be embodied in their agreement to have recourse to arbitration.

There are, however, certain disadvantages to arbitration as compared with litigation. Arbitrators are more likely to decide cases based on equity, rather than interpreting agreements literally, at least when there are common law influences. On the other hand, in addition, there is often only a very limited possibility for appeal from arbitral decisions, which may be an advantage as well as a disadvantage. Evidence and discovery rules are not as well developed as in common law litigation, though this might sometimes be an advantage, seeing as how excessive discovery is a major source of litigation

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<sup>163</sup> See the Statute of the International Court of Justice, Article 34.

<sup>164</sup> Comeaux, P.E. and Kinsella, S.N., *Protecting Foreign Investment under International Law – Legal Aspects of Political Risk*, Oceana Publications Inc., Dobbs Ferry, New York, 1996, p. 185.

expenses. Also, in arbitral proceedings, there are no set procedural tools, as there is in litigation. For instance, there is often a very slim chance for effectively executing security measures, such as the attachment of property.

On account of the sometimes time-consuming and costly nature of international arbitration, even where it is decidedly more effective than litigation before courts, parties should only decide to arbitrate after having carefully considered all other options, such as the diverse means of alternative dispute resolution; negotiation, mediation and conciliation<sup>165</sup> with the host state, and diplomatic pressure or other actions by the investor's home state, if possible.

In the Guidelines on the Treatment of Foreign Direct Investment<sup>166</sup>, issued by the World Bank in 1992, international commercial arbitration is encouraged. The Guidelines are no binding source of international law, of course, but they are based on a survey of existing legal instruments, conducted by the World Bank, and thus constitute an important indication as to the attitudes of most states towards international arbitration. In Section V of the Guidelines, the following is stated regarding arbitration:

'1. Disputes between private foreign investors and the host State will normally be settled through negotiations between them and failing this, through national courts or through other agreed mechanisms including conciliation and binding independent arbitration.

2. Independent arbitration for the purpose of this Guideline will include any ad hoc or institutional arbitration agreed upon in writing by the State and the investor or between the State and the investor's home State where the majority of the arbitrators are not solely appointed by one party to the dispute.'

The World Bank Guidelines may not be legally binding, as has been pointed out, but they do reflect an international trend amongst states to provide for arbitral settlement of disputes with nationals of other states, either through direct agreement with those nationals or in bilateral investment treaties or investment laws. In Vietnam, this international pro-arbitration trend may be clearly distinguished with the establishment of the new arbitral bodies in the beginning of the nineties.

## 6.5.2 Sources of Law

As is the case with virtually all basis of jurisdiction in Vietnamese law, also jurisdiction for the domestic arbitral bodies is derived from legislation. Although there is no comprehensive arbitration law *per se*, the

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<sup>165</sup> See *infra* regarding alternative dispute resolution techniques.

<sup>166</sup> *Legal Framework for the Treatment of Foreign Investment, Volume 11: Guidelines. Report to the Development Committee and Guidelines on the Treatment on Foreign Direct Investment*, 1992, The World Bank Group.

Government's Decree 116/CP<sup>167</sup> indicates an increasingly positive view towards arbitration from an official standpoint. Vietnamese authorities have been considering the UNCITRAL Model Law as a possible ideal for legislation in this respect, but as of yet there has been no suggestion towards when or in what form any comprehensive arbitration law might be issued.<sup>168</sup>

The fact that Vietnam is now a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), provides certain cause for optimism, with regard to the greater deftness concerning the use of international principles and practices in the field of commercial arbitration which will probably ensue. The Convention includes references to salient points of law of the country where the arbitration is to take place. Recognition and enforcement of an arbitral award may in some circumstances be refused, i.e.:

- where the award has not become binding on the parties;
- where the award was suspended by the relevant authority in the country where the arbitration took place; and
- where the composition of the arbitral body, or conduction of procedure, was not in accordance with the agreement between the disputing parties or, if no such agreement is available, not in accordance with the laws of the respective country.

In addition, recognition and enforcement of an arbitral award may be refused, should the competent authority find that the issue in question could not be settled in arbitration under the laws of its country or is contrary to the country's public policy.<sup>169</sup>

There are also several bilateral agreements in the field of arbitration, which Vietnam is a party to, that contain provisions for the legal endorsement of arbitration. For instance, a treaty with Australia on the furthering of investment between the two countries<sup>170</sup>, confirms that Vietnamese economic entities may select a foreign arbitration forum with respect to disputes with Australian investors.

The single most important piece of legislation, as far as provisions for arbitration are concerned, is the Law on Foreign Investment in Vietnam (FIL) from 2000, which is discussed *supra*. Under the FIL, the settlement of disputes is stipulated for in Article 24:

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<sup>167</sup> Decree 116/CP of 5 September 1994, on the Organisation and Operation of Economic Arbitration Bodies.

<sup>168</sup> Pryles, M., (ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 391.

<sup>169</sup> Comeaux, P.E. and Kinsella, S.N., *Protecting Foreign Investment under International Law – Legal Aspects of Political Risk*, Oceana Publications Inc., Dobbs Ferry, New York, 1996, p. 185.

<sup>170</sup> Reciprocal Promotion and Protection of Investment of 5 March, 1991.

‘Any dispute between the parties to a business co-operation contract, between the parties to a joint venture contract, or between enterprises with foreign owned capital or parties to a business co-operation contract and Vietnamese enterprises must firstly be resolved by negotiation and conciliation.

Where the parties fail to settle the dispute by way of conciliation, the dispute shall be referred to a Vietnamese arbitration body or a Vietnamese court in accordance with the law of Vietnam.

With respect to disputes between parties to a joint venture enterprise or a business co-operation contract, the parties may agree in the contract to appoint another arbitration body to resolve the dispute.

Any disputes arising from a Build- Operate- Transfer, a Build- Transfer-Operate or a Build- Transfer contract shall be resolved in accordance with the dispute resolution mechanism agreed by the parties and stated in the contract.’

Additionally, in Article 122 of Decree 24/2000/ND-CP<sup>171</sup>, which provides more detailed implementation regulations to the FIL, it is given that:

‘...failing [attempts at] conciliation, the disputing parties may, on the basis of mutual agreement, select one of the following dispute resolution alternatives:

- a Vietnamese court;
- a Vietnamese arbitration body, foreign arbitration body or international arbitration body; or
- an arbitration tribunal established pursuant to an agreement between the parties.’

Judging by these developments, it is now a definite possibility under Vietnamese law for parties to a commercial contract to agree to solve disputes arising under the contract by various forms of arbitration proceedings. This is an important point for foreign investors, especially considering the number of agreements made in Vietnam today which incorporate an arbitration clause referring to, for example, the UNCITRAL Rules.<sup>172</sup>

More specific sources of law in the field of dispute settlement, are the pieces of legislation governing procedures before the EAC, Economic Arbitration Centres, and the VIAC, Vietnam International Arbitration Centre. Regarding the EAC, the legal basis for operation is Government Decree 116/CP<sup>173</sup>, and the corresponding piece of legislation for VIAC is the VIAC

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<sup>171</sup> Decree 24/2000/ND-CP of 31 July 2000.

<sup>172</sup> Pryles, M.,(ed.), *Dispute Resolution in Asia* (2nd ed.), 2002, Kluwer Law International, the Hague, p. 393.

<sup>173</sup> Government Decree 116/CP of September 5, 1994.

Rules, based on Decision 204 and formulated in accordance with Article II of the Statutes of the Vietnam International Arbitration Centre.<sup>174</sup> As was said above, this situation, with separate legislation for the different arbitral bodies, could change in the not too distant future, as an all-embracing arbitration law may be passed. Details on these enactments will be presented below, in the continued discussions of the respective arbitral bodies.

### 6.5.3 Choice of Law

There are currently no statutory provisions in Vietnamese law regarding the choice of law in an arbitral context. All disputes originating between a domestic organisation and/or an individual will be examined and construed in accordance with Vietnamese law. Should one or more parties be foreign individuals or entities, the parties may choose their dispute to be governed by foreign law, as long as this does not contradict the principle of *ordre public*. In short, the parties have the autonomy to choose governing law from other legal systems, to submit different issues to rules from different legal systems, to submit disputes to rules common to more than one legal system, to combine national and international legal systems, and to submit to laws of a nationalized system frozen on a certain date, the above being some examples of acceptable choices of law in the situation of party autonomy given in a commentary on the ICSID Convention.<sup>175</sup>

In cases where the parties have refrained from choosing an applicable set of rules to have resort to in the event of a dispute, the tribunal will determine the law, using conflict of laws rules that it considers applicable. In a dispute involving foreign direct investment, many conflict of laws rules will point to the host state's law as the governing law.<sup>176</sup>

In the VIAC Rules, it is stated in Article 23 that the tribunal will consider not only applicable law, but also related international treaties, if any, as well as trade usage and international practice; in short, all relevant rules of international law.<sup>177</sup>

### 6.5.4 Establishing the Arbitration

For jurisdiction to lie with an EAC or the VIAC, parties to an agreement qualifying as an economic contract must have consented to the same in writing, by incorporating this into the agreement by way of an adequately drafted arbitration clause. Under the Ordinance on the Recognition and

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<sup>174</sup> The VIAC Rules were published on August 20, 1993. See also Decision 204/TTg on the Establishment of the Vietnam International Arbitration Centre of April 28, 1993.

<sup>175</sup> Comeaux, P. E. and Kinsella, S. N., *Protecting Foreign Investment under International Law – Legal Aspects of Political Risk*, Oceana Publications Inc., Dobbs Ferry, New York, 1996, p. 186.

<sup>176</sup> *Ibid*, p. 198.

<sup>177</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd edition), 2002, Kluwer Law International, the Hague, p. 393.



Enforcement of Foreign Arbitration Awards<sup>178</sup> an arbitration agreement is defined as a) a written agreement entered into by the parties for the resolution of disputes by arbitration, b) in the manner specified in the relevant country, c) of anticipated or existing disputes between the parties, d) which are capable of resolution in that manner. An agreement to submit to arbitration may take different forms. Often, it is an arbitral provision incorporated into the contract as a specified clause, which is by far the most common approach, or, it may be in the form of a separate agreement, especially if it is concluded after a dispute arises. For further discussion of the arbitration clause, see *supra*.

There are few statutory provisions as to the legal effect of an arbitration agreement under Vietnamese law. However, in Article 36 of the Economic Disputes Ordinance, the paramount importance of arbitral agreements is emphasized: ‘the Court will return the claim to the plaintiff where the parties concerned have a prior agreement to resolve the dispute by arbitration’. The same judicial attitude is displayed in Article 2 of the rather recently adopted New York Convention, which sets out the exclusive effect of an arbitration agreement under the Convention. Some sources hold that institutional arbitration is allowed in Vietnam only when governed by Vietnamese arbitral institutions, a viewpoint that may be doubted.<sup>179</sup>

In Decree 116/CP and Decision 204, provisions for the constitution of the tribunal are made. Rules are given for the selection and removal of arbitrators, payment of fees (the claimant initially makes a deposit and the losing party ultimately pays) and other administrative issues, as well as for the general conduct of the arbitral proceedings.

Procedures for the selection of arbitrators for an EAC or the VIAC are similar, although there are differences regarding some rather salient points. For instance, the VIAC permits the nomination of foreigners, resident or non-resident, to the list of arbitrators from which the parties may choose. Currently, however, there are eleven Vietnamese arbitrators at VIAC, most of whom speak French and Russian, but very few speak English adequately.<sup>180</sup> Therefore, at the moment, foreign arbitrators cannot be chosen and appointed, even if both parties desire so. An arbitrator at the EAC must be a Vietnamese citizen residing in Vietnam. Apart from this, he or she must be ‘ethical, honest, impartial and objective; and be wise and experienced in the fields of law and economics’<sup>181</sup>. Moreover, contemplated arbitrators must pass a professional test.<sup>182</sup> The panel comprises of either one or three arbitrators, who are selected from a list which is prepared by a committee appointed by the Ministry of Justice, for the EAC, whereas the

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<sup>178</sup> Ordinance on the Recognition and Enforcement of Foreign Arbitration Awards and Civilian Decisions within Vietnam of September 14, 1995.

<sup>179</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd edition), 2002, Kluwer Law International, the Hague, p. 393.

<sup>180</sup> *Ibid*, p. 394.

<sup>181</sup> Article 8, Decree 116/CP.

<sup>182</sup> Schot, Anne C M J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 365.

VIAC arbitrators are nominated by the Standing Committee of the VCCI (the Vietnamese Chamber of Commerce and Industry). The term of office for all VIAC arbitrators is four years. EAC arbitrators are appointed by the Ministry of Justice for a period of two years, but may be dismissed during this term. The Decree provides for the replacement of arbitrators unable to continue their functions, including replacement on the ground of partiality, although few expect such concerns to affect the practice of lobbying judges and arbitrators for a favourable verdict.<sup>183</sup> It is also to be noted that an EAC must be established by at least five arbitrators approved by the People's Committee at the location where the Centre is to set up. The Centre's licence will then be valid for five years, but if the number of arbitrators should fall below five, and a substitute cannot be found within six months, the EAC's licence will be repealed.<sup>184</sup> In the event of any dispute over the nomination of an arbitrator, the President of the VIAC or the EAC shall make the appointment. Each party selects one arbitrator, who then in turn together appoint the third arbitrator. All arbitrators are to be selected from the list of arbitrators at the respective arbitral body.<sup>185</sup>

### 6.5.5 The Proceedings

The proceedings before an EAC or the VIAC are begun by petition, which must include either a nomination of an arbitrator from the Centre's list, provisions for the selection of an umpire, or a request put to the President of the Centre to appoint one. This request is to be accompanied by the deposit of the arbitration fee, paid in full, which, in the case of VIAC, is calculated by reference to the disputed amount, in consideration of prevailing practice in the international arbitration institutions worldwide.<sup>186</sup> However, the definitive amount is set only after the receipt of the award by the losing party, unless otherwise agreed by the parties. The VIAC has a set table of fees, upon which the costs of the Centre are added. The Ministries of Justice and Finance have yet to publish any scale of fees on behalf of the EAC:s.<sup>187</sup>

The petition must be written in Vietnamese and/or, as far as the VIAC is concerned, a widely-used foreign language, such as English, French or Russian. Further requirements on the contents of the request for arbitration are identical for both EAC:s and the VIAC, and are, compendiously, as follows. The request shall contain particulars relating to the parties concerned and the claim, such as names and addresses of the plaintiff and defendant, the specific request(s) of the plaintiff, a statement of the relevant facts supported by evidence, the legal grounds on which the plaintiff proceeds with the request, the amount of the claim and the name(s) of the

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<sup>183</sup> *Ibid*, p. 365.

<sup>184</sup> *Ibid*, p. 365.

<sup>185</sup> See Articles 8-10 and 4, Decree 116/CP, Articles 8-10, VIAC Rules and Article 4, Decision 204/TTg on the Establishment of the Vietnam International Arbitration Center of 28 April, 1993.

<sup>186</sup> For instance, the amount payable for claims exceeding \$200 000 is \$4 250 plus 0,5% of any amount thereover; see the annexed table in the VIAC Rules.

<sup>187</sup> Schot, Anne C M J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 365-366.

desired arbitrator(s).<sup>188</sup> Another basic requirement is that a copy of the arbitration agreement must be annexed to the application for arbitration. Before both tribunals, provision is made for the filing of further written memoranda and evidence, should the judiciary consider this to be necessary.

Within seven days from the date of receipt of the request at the arbitral institution, a copy of the request and a list of the arbitrators that may be chosen shall be forwarded to the defendant. The defendant must then respond within the time-limit set by the tribunal, and it is vital that the response entail the same items as the lodged request.<sup>189</sup> There are express provisions for counter-claims in the VIAC Rules, but not in the regulations concerning EAC:s, although this is an issue that may be addressed in subsequent legislative publications. After a petition is submitted, regarding the VIAC, the defendant is entitled to give in a reply within 30 days after the receipt of a copy of the request for arbitration, or file a counter-claim<sup>190</sup>, which is to be accompanied by an additional deposit of fees and a choice of arbitrator. The counter-claim is to be lodged in accordance with the rules concerning an initial claim, which is given in Article 13 of the VIAC Rules. Should the plaintiff remain impassive during the first six months of the referral, the tribunal may choose to terminate the proceedings.<sup>191</sup>

Regarding hearings of the matter at hand, the arbitrators determine *ex officio* whether or not to hold a pre-hearing, or even a pre-hearing inquiry into the case, seeing as how they appear to be masters of their own procedure.<sup>192</sup> During a pre-hearing inquiry, parties, experts and even third parties may be consulted, the latter not necessarily in the presence of the parties, according to Article 20 of Decree 116 and Articles 14-15 in the VIAC Rules. Summons to the hearing are to be given out 15 or 30 days before the commencement of the hearing, according to Article 21 of Decree 116 and Article 17 of the VIAC Rules respectively. Under the VIAC Rules, the parties also have the possibility to reduce or extend this time period. The main hearing is often held in Hanoi, or at some other location in Vietnam upon request of the parties, as far as the VIAC Rules are concerned, or where the panel deems necessary. As was said above, foreign counsel may be employed, but seeing as how the hearing itself is to be conducted in Vietnamese, non-Vietnamese speakers are clearly at a disadvantage, although a foreign party may request the VIAC to provide interpreters. Parties may appear in person or through their representatives. Should one party fail to appear without valid reason, the hearing may proceed. It is also a possibility for the tribunal to decide the matter on the basis of the file itself, should the parties agree thereupon.<sup>193</sup> Hearings are held *in camera* and are confidential.

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<sup>188</sup> Article 13, Decree 116/CP.

<sup>189</sup> Article 12, Decree 116/CP.

<sup>190</sup> There exists an express right to file a counter-claim under the VIAC Rules, but only an implicit right before an EAC.

<sup>191</sup> Article 32, Decree 116/CP.

<sup>192</sup> Pryles, M., (ed.), *Dispute Resolution in Asia* (2nd edition), 2002, Kluwer Law International, the Hague, p. 399.

<sup>193</sup> Article 19, 22-23, Decree 116/CP and Articles 19, 21, VIAC Rules.

## 6.5.6 The Award

As would be expected, the tribunal is obliged to render its decision as soon as possible after the hearing. The award is stated to be, as is the general rule where arbitration is concerned, final and conclusive.<sup>194</sup> The tribunal may, however, revise its decision in should any clarification or minor correction become necessary, provided that any such correction does not affect the substance of the award. It may be noted that slightly more leeway as far as modifications of the award are concerned is provided for under the VIAC Rules; Article 30 states that rectification is possible where certain points have not been fully covered in the award, in addition to errors in calculation or spelling, which is to be compared with Article 28 of Decree 116, which gives that rectification is possible only in the case of mistakes in relation to calculation or spelling.

The arbitral award is to be decided by majority vote and signed by the arbitrators or arbitrator. Announcement of the award shall take place at the time of conclusion of proceedings, or a maximum of five days later as far as EAC:s are concerned and at a later time as decided by the tribunal in the case of the VIAC. The EAC award is to be served on the parties concerned within three days of its issuance, and the VIAC award within 30 days.

Execution of the EAC award, if not voluntarily effected by the implicated party, may be requested by the other party before the People's Court of competent jurisdiction (in other words, before the Economic Court). Should an award given by the VIAC go unheeded, effective measures of enforcement shall be applied in accordance with the law of the country where enforcement of the award is sought (in Vietnam this again means recourse to the Economic Court) and with international treaties applicable to the matter.<sup>195</sup> Indeed, should a party choose not to honour the award given by either institute, a considerable practical problem arises. There are now provisions for the enforcement of domestic court judgements, with practices such as the enforced sale of assets, seizure of accounts and other similar measures, in place in Vietnam, but the enforcement of an arbitral award, on the other hand, involves applying to the Economic Court with a request for recognition and enforcement of the award, as was discussed *supra*. Unfortunately, from a rule of law point of view, there are no limits imposed on the scope of the court's enquiry into the merits of the request, which means that despite the supposed finality of the award, the entire case may be re-examined. An ironic aspect of the legal situation in this issue is that an award from either an EAC Centre or the VIAC may stand a better chance of enforcement abroad under the New York Convention than within Vietnam. Parties to agreements with Vietnamese entities may prefer to arbitrate abroad in order to take advantage – for the purpose of award enforcement

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<sup>194</sup> See for instance Article 5, Decree 116/CP, which states that the award is final and cannot be appealed before any other court or organization.

<sup>195</sup> Articles 25-31, Decree 116/CP and Articles 25-31, VIAC Rules.

within Vietnam – of its accession to the New York Convention in 1995 and the commensurate machinery for enforcement contained therein.<sup>196</sup>

### 6.5.7 Judicial Intervention

It appears that no provision for judicial aid and intervention in support of the arbitral process exists in Vietnam. Accordingly, while there may be little to stop a party from seeking judicial intervention or assistance, the prospects of success appear quite limited. Nor do any provisions exist for the judicial review of an arbitral award before the Vietnamese courts. This could be an issue where, for example after issuance of an award, it is discovered that one of the arbitrators was guilty of taking bribes, had an undisclosed interest in the proceedings, or whose impartiality was otherwise compromised.<sup>197</sup>

### 6.5.8 BOT and Dispute Settlement by Arbitration

Before discussing certain, more specific, aspects of arbitrating an international BOT-project dispute in a legal climate such as Vietnam, it is important to remember that most disputes of this kind are settled by means of alternative dispute resolution methods, which are examined *infra*. However, should a disputed matter be brought to its point, softer settlement techniques tried and dismissed, there is no question that arbitration would be the means of dispute resolution preferred by the parties in a BOT connexion, as in any other commercial connexion. Again referring to the preferences of commercial parties, in so far as what may be gathered from the doctrine in this field of law, international arbitration is the most favoured type of arbitration, in a BOT context as well as in other commercial contexts. An international arbitration is typically held at an established arbitral institute, such as the ICC, the LCIA, or the Arbitration Institute of the Stockholm Chamber of Commerce, since this saves the parties from having to organise *ad hoc* proceedings. These arbitral tribunals also have set arbitral rules and procedures.

In the context of dispute settlement in Vietnam, the BOT Regulations<sup>198</sup> distinguish disputes between the BOT company and sub-contractors, and those between the BOT company and the Vietnamese government. Disputes arising between the BOT company and sub-contractors must first go through negotiation and conciliation, see further below. This is specified in Article 15.1 of the BOT Regulations. Any remaining disputes are to be settled through arbitration by agreement of the parties. Suitable arbitration institutions enumerated in Article 15.1 are Vietnamese arbitral bodies, an ad-hoc arbitrator established by the parties, an arbitration body of a third

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<sup>196</sup> Pryles, M. (ed.), *Dispute Resolution in Asia* (2nd edition), 2002, Kluwer Law International, the Hague, pp. 400-401.

<sup>197</sup> *Ibid*, p. 401.

<sup>198</sup> Decree 87/1993/ND-CP, Regulations on Investment in the Form of Build- Operate- Transfer Contracts of the 23 November 1993.

country or an international arbitration tribunal. Also where the disputing parties are the contractor and the Vietnamese government, negotiation and conciliation are prerequisite first steps in the resolution of the dispute at hand. Should conciliation fail in this case, however, it is stated in Article 15.2 that ‘the parties to the dispute shall refer it to an ad-hoc arbitrator established by the parties for resolution’. The procedure to be used is to be agreed upon by the parties, as is the law to be applied by the tribunal. According to Article 15.2.4, the decision reached by the arbitrator shall then be enforced in accordance with the laws of Vietnam, something that might be a conundrum in itself, despite Vietnam’s not-so-recent accession to the New York Convention, as was discussed *supra*. No awards have yet been enforced, and until they are, doubts will persist about how efficiently, and objectively, claims for enforcement against Vietnamese state-owned entities will be processed.<sup>199</sup>

These provisions should be clarified by specifying that: 1) either party may refer the matter to arbitration without this requiring the agreement of the other party (as is seemingly implied in Article 15 of the Regulations) and 2) the arbitration does not have to take place in Vietnam, nor under Vietnamese law (since Article 15 does not specifically forbid the use of foreign arbitrators, and does not specify that the procedure cannot be performed abroad or under which country’s law or which complex of rules, either). However, these matters do have to be agreed upon by the state contracting entity. Any foreign law or other complex of rules that is chosen, such as the UNCITRAL Rules or the ICSID Rules, must not be contrary to the laws of Vietnam. In addition, any stipulation towards that foreign law, or another set of rules, be applied in a possible dispute, must be approved by the Ministry of Justice, which issues its approval in the form of an opinion letter.<sup>200</sup> The practical possibility of not using Vietnamese law when settling disputes may be held to seem unclear. It should also be noted that in cases where the investors come from a country that has signed an investment protection and promotion treaty with Vietnam; disputes between investors from that state and the Vietnamese government will then be resolved under the terms of that treaty.<sup>201</sup>

Confusingly, there are also regulations aimed specifically towards dispute resolution in a BOT context in the FIL, which is cited above, where it is stated in Article 24, paragraph 4, that ‘any disputes’ arising from a BOT contract shall be resolved in accordance with the dispute resolution mechanism agreed by the parties ‘and stated in the contract’. Seeing as how

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<sup>199</sup> Foster, T. and Knight, A., ‘Legal Issues in BOT Projects in Vietnam’, *The Journal of Project Finance*, 1997, p. 12.

<sup>200</sup> Kerrigan, E., ‘Bringing a BOT Project to Closure in Vietnam: Problems and Prospects’, *Journal of Project Finance*, 2000, p. 7.

<sup>201</sup> Foster, T. and Knight, A., ‘Legal Issues in BOT Projects in Vietnam’, *Journal of Project Finance*, 1997, p. 12, referring to Article VI.1 of Circular No. 333-UB-LXT, Guiding the Implementation of the Regulations on Investment in the Form of Build-Operate-Transfer Contracts, and Finch, James S., and Vecchi, Sesto E., ‘BOT Contracts in Vietnam: Regulations and Guidance’, 17 No. 3 *East Asian Executive Reports*, 1995, p. 26.

the FIL, the Law on Foreign Investment, is the principal piece of legislation on foreign investment activities in Vietnam, and was redrafted lastly and for the third time on 9 June 2000, when the BOT Regulations is a Government's Decree in form, and from 1993, one may be tempted to grant decisive importance to the FIL provision. Such a standpoint would be well supported by the principles of *lex superior derogat inferior* and *lex posterior derogat priori*, that is, a statute higher up in the legislative hierarchy overrules a statute of lesser rank, and a later statute overrules an earlier one. The fact that the BOT Regulations is a set of rules especially intended for BOT situations cannot reasonably, by way of the principle of *lex specialis*, that a more specialized provision overrules a more general one, be assigned greater significance.

It is unclear whether the Vietnamese government plans to amend the law in respect of BOT projects, so that dispute resolution on an arbitration level is explicitly allowed, in all cases, through other entities than those accounted for *supra*. It would naturally also be highly desirable, especially for foreign investors not completely *au jour* with the Vietnamese system, if provisions governing dispute settlement, and, of course, other issues, in connection with BOT projects might be found in one, clearly authoritative, valid and applicable piece of legislation. Moreover, it would be advantageous in general, should the dispute resolution provisions applicable to the BOT contract be the same as those applicable to the ancillary contract(s), as the two agreements will probably overlap in some areas and possible disputes preferably be resolved in a consistent manner. In concordance with today's legislation, if one is to, considering the worst-case scenario, take heed to the BOT Regulations, only a very limited choice of arbitral dispute resolution mechanisms are offered BOT parties in disputes with the governmental body party to the contract.<sup>202</sup>

In the government's Decree 18-CP, Regulations for Implementation of the FIL, it is stated in Article 15, that even after the contract has expired, all provisions concerning the resolution of disputes and rights of action will remain effective within the limitation period under Vietnamese law or by prior arrangement between the parties. Although the scope of this provision does not explicitly comprise BOT enterprises (the forms of business operation listed are joint venture, enterprise with 100 percent foreign-owned capital and operation under a business cooperation contract, i.e. a BCC), but seeing as how the BCC is the comprehensive form for production-sharing projects, under which the BOT is one of various more specialised set-ups, the application of the provision on BOT contracts is reasonably not a one. To be able to rely on the separability of an arbitral clause from a contract otherwise deemed as invalid, might be infinitely valuable to a foreign party in a legal climate as potentially fickle as that of Vietnam. The importance of drafting an adequate provision for dispute resolution as soon as possible

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<sup>202</sup> Malinasky, L. A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', Berkeley Journal of International Law, 1996, p. 458.

during negotiations, and making sure that it is appropriately incorporated in the agreement, cannot be sufficiently emphasized.<sup>203</sup>

### 6.5.9 Means of Alternative Dispute Resolution (ADR)

The tradition of informal dispute resolution is customarily very well asserted in Vietnam and still influences the way disputes are handled. All forms of disputes are encouraged to be resolved by direct negotiation, mediation and conciliation. The government has not established any specific rules governing the appointment of mediators or conciliators, nor does it interfere in the choice or process of the negotiation, mediation or conciliation. With respect to foreign investment disputes, as is mentioned supra, statutory provisions in the FIL obliges the parties to such a dispute to try their hand at alternative means of solving their differences, rather than allowing immediate resort to arbitration. The normal course of affairs is that parties first try negotiation in good faith for a specified period of time, and then submit their dispute to mediation and/or conciliation.

Negotiation consists basically of discussions between the interested parties, with a view to reconciling divergent opinions, or at least understanding the different position maintained by the other party. Good faith negotiation is often inserted into dispute resolution clauses as a necessary precursor to arbitration. Mediation shows the same salient features as negotiation, but a third party is present to assist the parties in settling their dispute. Mediation is also very much in the spirit of business dealings in Asia in general, and provided that an acceptable and authoritative mediator can be found, this method linked with either arbitration or litigation following failure, may well be the best solution in Vietnam. Conciliation has been said to differ from mediation in that the third party assisting in the settlement of the dispute may make separate inquiry into the facts surrounding the dispute, and will eventually produce a report recommending terms of settlement. Conciliation differs from arbitration, however, in that the report is in no degree binding on the parties. The primary advantage to requiring negotiation, mediation or conciliation as a precondition to arbitration is that using alternative dispute resolution techniques provides a fast, non-binding, non-adversarial, and inexpensive method of resolving disputes. It might also help relieve a tense situation, which may only become more inflamed by the immediate resort to arbitration.<sup>204</sup>

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<sup>203</sup> Decree 18-CP of April 16, 1993.

<sup>204</sup> Comeaux, P.E. and Kinsella, S.N., *Protecting Foreign Investment under International Law – Legal Aspects of Political Risk*, Oceana Publications Inc., Dobbs Ferry, New York, 1996, pp. 214-215 and Schot, A.C. M. J., *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 368-369.



### 6.5.9.1 BOT and ADR

Regarding alternative means of dispute settlement in the context of BOT-contracts specifically, it is said in all legislative documents pertaining to BOT dispute settlement; the FIL, in the Government's Decree 24/2000/ND-CP of 31 July 2000 implementing the FIL on a more detailed level, and in the Government's Decree 87-CP, Regulations on Investment in the Form of Build- Operate- Transfer Contracts of the 23 November 1993 (Decree 87), that any dispute between the contracting parties must firstly be resolved by negotiation and conciliation. Only when these methods fail, may the parties take the matter to an arbitral level.<sup>205</sup>

On the other hand, it is also given in Article 24 of the FIL that the parties are free to agree to any dispute resolution mechanism of their choice, such as they have stated in the contract. It is unclear whether this means that the parties can indeed waive the obligatory ADR stated in Article 24 of the FIL, which would indeed render any process-economic motifs behind that particular clause rather futile.

#### 6.5.9.1.1 Dispute Review Boards

The use of Dispute Review Boards (DRBs) may be the preferable alternative for resolving disputes in connection with complicated Vietnam-based projects, particularly where large projects with many participants from different countries are concerned. Ideally, a DRB is comprised of three qualified and experienced experts, selected by the parties, either in the contract itself or immediately after the contracts has been signed. One important feature is that the costs of the DRB review is shared equally between the parties, whatever the outcome of any dispute referred to it may be. The DRB mechanism is said to have a high success rate; employers of the method are generally very satisfied with the workings of the system, mainly due to the time-saving aspect and the fact that friction between the parties is minimized.

The DRB usually meets regularly on the project site. Therefore, its members know the project and disputes may be submitted in a relatively informal manner. The active and regular involvement of the DRB members during the course of the project most decidedly means better informed decisions with a minimum of delay, and often at lower cost for the parties, at least when compared to a fully-fledged arbitral proceeding.

DRB members typically express their own views with regard to any disputes submitted to them, as opposed to recommendations being the result of a compromise between the members, as is often the case with conciliation or arbitration. DRB recommendations are of course not binding, and parties are

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<sup>205</sup> See for instance Article 24 of the FIL, Article 122 of Decree 24/2000/ND-CP, as cited in the text *supra*. See also Article 15 of Decree 87/1993/ND-CP, which states that the same conditions apply for contracts ancillary to the BOT contract, such as agreements with sub-contractors.

entitled to refer their disputes to an arbitration institution under the prerequisites given in the BOT agreement.<sup>206</sup>

### 6.5.10 Concluding Remarks: Dispute Settlement by Arbitration

The globalization of the economy and the increase in the number of multinational ventures has led inevitably to a rise in commercial disputes that cross national boundaries. Arbitration is the most widely accepted alternative to court litigation and has been used worldwide to resolve legal disputes promptly and cost-effectively. Arbitration has unique advantages over litigation as a means of resolving international commercial disputes. Awards are binding and treaties permit their enforcement in most countries. Cases are heard in private, typically in a neutral forum, and with fewer formalities. Compared to litigation, disputes may be resolved more quickly and at lower cost, with little or no publicity. Other non-litigation alternatives, such as mediation or other alternative dispute resolution techniques, also can be used as adjuncts to, or instead of, formal arbitration.

Adequate dispute resolution and enforcement mechanisms are central to the adoption of the rule of law. Lately, these issues have been dealt with on Vietnamese governmental level with great importance and some urgency. This might be due to a different awareness more recently of how the concept of market economy could transform the opportunities of a nation, seeing China's transformation of its planned economy system into an initial socialist market economy system as a lodestar. The dismantling of the planned economy system and the deepening of the reform of the economic system, commodity, capital, labour service and technology markets have appeared one after the other in China, and not unnoticed so on the international plane. For Vietnam, it is now all about implementing a workable structure for foreign investment, which very much includes a reliable system for the settlement of commercial disputes.

A major step in this respect is joining the global arbitral community. Vietnam has, during the last decennium, acceded to a number of international conventions on arbitration. While this should improve enforcement, domestic courts still retain a major role in the crucial process of giving arbitral awards executive power.<sup>207</sup> From a practical point of view, considering the current state of things, foreign investors may be recommended to use the VIAC for their arbitrations, since it has the significant advantage of having its awards likely of being enforced.<sup>208</sup>

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<sup>206</sup> Schot, A.C. M. J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 368-369.

<sup>207</sup> Malinasky, L.A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', 14 *Berkeley Journal of International Law* 438, 1996, p. 459.

<sup>208</sup> Schot, A.C. M.J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 363.

Perhaps the most significant problem for BOT project private parties involves disputes with the host government. Vietnam has not yet ratified the Washington Convention of 1966<sup>209</sup> concerning dispute settlement between the government and a foreign party. If the Vietnamese government was to join the Convention, this would envisage a major commitment towards the immediate recognition and enforceability of awards in the eyes of a prospect investor, especially if the second reservation, stating that the Convention be applicable only to legal relationships considered as commercial under the national law of the state making such declaration, was not made use of.<sup>210</sup>

The situation in Vietnam today is that government overseers make decisions regarding critical aspects of each BOT project. Vague, or even unpublished, regulations make dispute resolution unreliable and the outcome hard to anticipate. Furthermore, without a mechanism for administrative review, investors are not guaranteed to receive a fair adjudication. Under current law, the grounds for judicial review of administrative action are limited to illegality or *ultra vires*.<sup>211</sup> Since the various state agencies enjoy significant subjective discretion, in practice, investors can never seek judicial review of decisions. Moreover, a system without any separation of powers or check-and-balance functions may have additional inherent problems with the provision of independent review of administrative decisions. The practical use of the dispute settlement provisions, not only in the BOT context, will remain negligible until investors receive adequate protection from government action, both in theory and in practice. Although referring to international bodies to settle disputes may run contrary to Vietnam's desire for domestic development and public policy in general, reliance on such entities may provide valuable during this evolutionary stage for Vietnam as a nation. It is already the case that non-governmental arbitration apparently is much preferred, by both Vietnamese and foreign parties, compared to arbitration performed by governmental organizations or lawsuits, because of the distrust in state-arbitrators and judges and the ability to settle disputes *in camera*.<sup>212</sup>

One possibility would be to require initial resolution of all disputes through domestic mechanisms, while allowing an international arbitral institution to review all decisions, should either of the parties pose a demand in this respect. In so doing, Vietnam would maintain primary jurisdiction, allowing the country to build experience and bolster investor confidence in Vietnamese courts and arbitral bodies, while foreign investors would gain

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<sup>209</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also called the ICSID Convention, which entered into force in 1966.

<sup>210</sup> Instead, Vietnam has concluded a considerable number of bilateral investment treaties, BITs, during the last decennium, often providing for arbitration under the Washington Convention. Critics call for a firmer stand by the Vietnamese government, that is, accepting the Convention in its entirety. See Annette Magnusson, "A note on General Principles of Arbitration in Sweden", in Stockholm Arbitration Newsletter, 2/2004.

<sup>211</sup> Malinasky, L.A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', 14 Berkeley Journal of International Law 438, 1996, p. 459.

<sup>212</sup> Schot, A.C.M. J, *Legal Aspects of Foreign Investment in the Socialist Republic of Vietnam*, 1996, Kluwer Law International, Dordrecht, p. 363.

the assurance of unbiased review. Another form of assurance would be definitive pre-approval of the choice of law. As it is now, it is uncertain, in the event of a future dispute, whether a given Ministry of Justice's opinion will be determinative. Assuming it can be relied on, the wording of the opinion would be very important, and time should be spent ensuring that the Ministry of Justice's opinion meets the foreign investor's and lender's needs. Although this approach may prove burdensome, in the nascent years of Vietnam's legal systems, the benefits of investor confidence may outweigh the costs.<sup>213</sup>

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<sup>213</sup> Malinasky, L.A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', 14 Berkeley Journal of International Law 438, 1996, p. 459-460.

# 7 Future Legal Aspects and FDI in Vietnam

## 7.1 Introduction

The Vietnamese society is moving fast toward a market-oriented economy. The resolution of the Cambodian conflict and the normalization of the diplomatic relations with China in 1991, has paved the way for Vietnam's trade and diplomatic relations with Western countries and ASEAN members. Since the *Doi Moi* and lifting of the US trade embargo in 1994, Vietnam has emerged from international isolation and gained a sustainable competitiveness in the international arena and on foreign markets. The country moves determinedly towards attaining the objective of 'making friends with all countries'.<sup>214</sup> It has now established diplomatic relations with over 170 countries, trade relations with over 221 countries and investment relations with more than 70 countries.

In 2004, Vietnam went through its ninth negotiation round for WTO accession and successfully held the fifth Asia Europe Meeting – ASEM 5, in Hanoi.<sup>215</sup> With these actions, the regime is responding to the necessities of modernization as well as multilateral pressures to liberalize political policies and allowing private participation into their communistic, commercial market. Vietnam has been trying to join the WTO for a number of years and now forecasts accession in 2006, which would mean fundamentally integrating into the global economy. Vietnam is at an advanced stage, where it is seriously negotiating accession terms with bilateral partners. Particularly Vietnam's bilateral trade agreement with the US is an important stepping stone towards the WTO. Vietnam's willingness to cooperate diplomatically and commercially on a global level and meet the demand from the business community for legislative improvement and transparency will enhance their reputation in the international financial markets. Recently, the World Bank applauded the Vietnamese investment climate, when Vietnam was one of the countries being cited as 'examples of nations having successfully implemented juridical reforms – a fundamental factor in improving the investment climate', an assessment made by the World Bank in 'The World Development Report 2005; A Better Investment Climate for Everyone', released after surveying more than 30 000 businesses in 53 developing countries.<sup>216</sup> However, it is important to remember that many of the requirements for acceding to the WTO involve bringing a country's economic and legal systems into conformity with international best practice

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<sup>214</sup> Thayer, C. A. and Amer, R. (ed), *Vietnamese Foreign Policy in Transition*, IUSEAS, St Martin's Press, New York, 1998, p.218.

<sup>215</sup> Vietnam Economic Times, The Insider's Guide to Business and Lifestyle, Issue 130, Dec.2004, p. 48.

<sup>216</sup> Vietnam News, 'World Bank Applauds Vietnam's Investment Climate', 2004-09-30, pp. 1-2.

as defined by WTO standards. There is still a lot of work to be done in that respect, although Vietnam certainly has the will necessary.<sup>217</sup> For instance, solely in the period between January 1 and July 22 of 2004, Vietnam attracted 359 foreign direct investment (FDI) projects with total pledged investment of nearly US\$ 962.5 million.<sup>218</sup> Despite these figures, the Planning and Investment Ministry's (MPI) expected figure of US\$ 4 billion for 2004 was not reached; after ten months of the year, foreign direct investment was up to US\$ 3.2 billion, and prophets of woe maintain that investors are still wary of Vietnam's changing business environment, especially sudden changes in relevant legislation. However, this was an increase of 35.9 percent over the same period in 2003.<sup>219</sup> The MPI, confident of a rebound in FDI inflow for this year, is now taking drastic measures to improve the investment environment in order to achieve the goal of attracting US\$ 4.5 billion in foreign investment in 2005.<sup>220</sup>

The five-year Socio-Economic Development Plan (SEDP) for the period 2006-2010 will rethink the role of the Vietnamese government, not as a producer of goods and services, but rather as a leader in the development process. The Vietnamese government is aiming towards laying the foundation of a modern economy and achieving sustainable and high economic growth rates at the same time as it is trying to maintain its stability and sovereignty. The government seem to be very content by the completion of the *Doi Moi* and transition to a capitalistic market economy. However, every successful market economy requires a balance between the market and the government. The government has an important role in providing certain basics like infrastructure, a social safety net and educational assistance. Moreover, the government's responsibility in balancing within the legislative and regulative area is highly significant for the foreign investment community.<sup>221</sup>

## 7.2 Domestic Corruption and Bureacracy

Corruption harms the public in many different ways. For example, the end product in a BOT is not necessarily the best that the market has to offer because the incentives have diminished along the road. It harms the contractor by lessening the incentive to provide a fully competitive product or service. Corruption also occurs in the licensing and authorizing procedures. The applications and approval of foreign enterprises are subject

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<sup>217</sup> Vietnam News, 'US Bilateral Trade Agreement Is a Stepping Stone Toward the WTO', 2004-12-14, p. 6.

<sup>218</sup> See further

<http://www.vietnampanorama.com/finance/FDINews.htm>, 040804, kl.20.21

<sup>219</sup> Vietnam News, 'Foreign Direct Investment: a Less-than-rosy Picture', 2004-11-08, p. 15.

<sup>220</sup> See <http://www.vneconomy.com.vn/eng/?param=category&catid=07,050207>, kl.14.56.

<sup>221</sup> MPI / UNDP - Report on the Economic Integration and Viet Nam's Development Strategy – Assistance on the Preparation of a Socio- Economic Development Strategy, Viet nam up to the year 2010, 2001, Project VIE99/0021, p.1.

to multiple levels of government agencies with conflicting powers and interests. The approval procedure is far from centralized and if a network is not developed and established the approval process can take many years and can involve costly years of waiting for a foreign investor. Local officials have taken advantages of the investor's impatience by making the approval or license contingent on bribes or 'gifts'. Networks are essential for surviving in business. In Vietnam however, the personal/social network is the same as the business network, therefore there is only one kind of network. Because of complicated business structure, networks are needed to identify the decision-makers. Foreign companies are often forced to go through embassies, consulates, ministries, different business organizations and Joint Ventures to open doors to important decision-makers and networks. Because of the poor economic situation in Vietnam, the business environment is very price focused. Local official have taken advantage of investors impatience by making approvals and licenses dependent on bribes and 'gifts'.

Another important factor when investing and cooperating with Vietnamese local enterprises is the differences between the state-owned (SOEs) and the privately owned companies. Private owned companies are largely business driven and work towards generating profit. Bureaucracy and corruption exists in private companies as well as in state-owned ones but in private companies the attitude that "the money is from their own pocket" seems to decrease the level of corruption. The SOEs, on the other hand, are large slow, bureaucratic and consensus driven. The enterprises are focused around keeping people employed rather than generating profit and the salaries are usually very low.<sup>222</sup> The combination of low salaries and bribes seems to foster corruption. People must gain income from other sources than their salary, hence the widespread corruption.

Until the government is able to reduce the bureaucracy and corruption within SOEs and governmental agencies, working with the Vietnamese authorities as a counterpart will always be a liability and risktaking to the foreign investor.

## 7.2.1 Cultural Differences and Discrepancies

The different objectives and goals of a Westerner and a Vietnamese can result in complications when creating a business-relationship. Relationships are necessary to receive the projects, in order to make a transaction. The decisions are made on emotional values, as personal chemistry and liking, rather than on facts. Business-relationships are therefore very closely related to social relationships. Dinner, lunch, karaoke, sport activities and other social events are common and essential to business. A short-term perspective also characterizes the business-relationships in Vietnam. The Vietnamese build the business-relationship for the benefit of today's

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<sup>222</sup> Before the *Doi Moi*, employees in SOEs were granted lifetime employment.

business, not the benefit they can gain from relationship in the future. If a better business opportunity emerges, the company will probably change to another partner. This is unfortunately the opposite way of doing business than the Western companies. Long-term relationships are necessary in a business since they increase effectiveness and hopefully the profitability.<sup>223</sup>

## 7.2.2 Importance of Business-relationships

Business relationships are of high importance in Vietnam and western companies must have connections everywhere to enable business. Since the dispute settlement system is unreliable and unpredictable, the foreign investor have to rely on the business built on trust between the parties rather than on contracts. Contracts are signed, but cannot be used as security if any problem occurs and there is no contract law to apply if the contract is not followed. Mr. Wenneberg said ‘When you don’t agree you solved it, it is possible to go to court but that is useless, you can never ever win the case anyway’.<sup>224</sup> The foreign companies adjust and accept the fact that they would lose in the courtroom and therefore solve the issues instantly before even considering judicial procedures. Therefore are trust and communication prerequisites to build a business relationship. When lacking communication the parties can never develop a successful business relationship. The language barrier is sometimes difficult to overcome. Even though interpreters can be used, it is said the communication becomes more formal and impersonal since a neutral part is in-between the two parties. Both empathy and patience is needed to be able to adapt to and understand the Vietnamese culture.<sup>225</sup>

## 7.3 Legislative Advancement

The probability of random government regulation and legislation undermines the predictability of investing and doing business in Vietnam. Enforcement mechanisms to limit and mitigate the likelihood of such ad hoc regulation would make investment in the country more appealing.<sup>226</sup> Vietnam should actively work towards greater clarity in the legislative framework and the legislative process. Usually this can be achieved through new laws, but in the case of Vietnam, there is too many decrees issued annually already, that more unfamiliar, new laws would only increase the level of confusion. Furthermore, increased transparency in the legislative process is also desirable among the operators on the market. Far-reaching reforms of both the legal and institutional framework are required to make the financing techniques of BOT projects and private sector provisions

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<sup>223</sup> Interview with Mr. Bui Kinh Duong, Deputy General Director, ABB Vietnam, 041006.

<sup>224</sup> Interview with Mr. Gunnar Wenneberg Ericsson,

<sup>225</sup> Interview with Mr Eric Rydgren, President & Country Manager, ABB Vietnam, 041006.

<sup>226</sup> Sorabella, W.B., ‘Less Developed Country as Start-up Corporation: Adopting the Venture Capital Model for Development in Light of Global Capital Market Realities’, Law and Policy in International Business, 2000, p.8.



sustainable over a considerable period of time. The emerging capital market must be nurtured to ensure efficient channelling of foreign investment capital into the communistic country. In addition to these actions in the mitigation of risk, new and innovative contractual mechanisms may be developed to reduce the exposure of the BOT projects.

In the future, it will be interesting to see whether Vietnam improve with the increased use of existing laws. Large amount of work remains to be done in order for the legal regime of Vietnam to be categorised as comprehensive, i.e. effective and consistent in concordance with transparent implementation. Vietnam, as an up and coming, emerging market, is well placed to continue steadily on the path towards economic growth and development.

There are five elements that are crucial to a well functioning, evolving Vietnamese legal society.<sup>227</sup>

1. Legal rules must be comprehensible so that people can understand the law and comply with it.
2. The law should be able to guide people in the conduct of their affairs.
3. The law should be stable.
4. The law should constitute a supreme source of authority whose scope should include officials as well as ordinary citizens.
5. The law should be impartial, applied by competent and fair judges, and courts should be available to enforce it.

### 7.3.1 Labour Restrictions

In comparison to other emerging countries, labour costs in Vietnam are still significantly low. However, there are some labour restrictions employers have to consider. Circular No. 105 imposes a strict quantitative limit of 3 % on the number of foreign employees that a foreign invested company may hire. The Ministry of Planning and Investment has called for a relaxation of the Circular. The Ministry of Labour, Invalids and Social Affairs do not agree with the proposition and is reluctant to revision of the Circular. This matter is crucial. 3.2 billion USD worth of FDI capital has flowed into Vietnam during the first 10 months of 2004, an increase of nearly 36% over the same period in 2003. Furthermore, 550 billion VND will be spent on tourism infrastructure to create the conditions to attract 18 million tourists in 2005.<sup>228</sup> As a developing nation, Vietnam cannot afford to have Circulars that acts like disincentives to foreign investors and foreign national employees. They must focus in attracting foreign enterprises in order to gain technology transfers and high skills from foreign nationals, that can transfer that know-how amongst Vietnamese nationals.

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<sup>227</sup> [http://www.international.westlaw.com/result/documenttext.aspx\\_040916](http://www.international.westlaw.com/result/documenttext.aspx_040916), kl. 10.34.

<sup>228</sup> Vietnam Economic Times, 'The Insider's Guide to Business and Lifestyle', Issue 130, Dec.2004, p. 35

### 7.3.2 Restructuring the State Owned Enterprises

SOEs in Vietnam have a very bureaucratic business structure. The structure is hierarchical and decisions have to pass through several authorities at different levels. There is often no communication between and within these authorities. As a consequence, the decision-process becomes very time-consuming, not to mention the high level of corruption.<sup>229</sup> Vietnam will need to restructure, equities or close SOEs, to increase their performance and reduce the burden they impose on the rest of the economy. Since the *Doi Moi*, the state has started to retreat from its role as a manager and owner of state enterprises.<sup>230</sup> In privatising and liberalizing the state monopoly, the communistic regime in Vietnam may lose some of its control over the capital and the industry market. On the other hand, they will gain operational efficiency, utilizing external funding and commercial expertise and accessing new sources of technology. The way to success is through more competition and privatization, but less of corruption, bureaucracy and threats of bankruptcies.<sup>231</sup>

### 7.3.3 Legal Actions in 2005

The legal framework has been improved but remains inconsistent and changeable. The corporations' rights are still unclear and the judicial system is untried. The FIL was very central in opening up markets, allowing for easier entry. Nevertheless, the ensuring of fair competition and revising the Tax Laws remains. Without these, the private sector cannot function. Vietnam needs to simplify its investment incentives if the country is to attract investors in an increasingly competitive regional environment. Vietnam's tax incentives and tax rates are already broadly comparable to those offered by other countries in the region.

Vietnam's first-ever Competition Law includes regulations on business rights to compete with each other and control of competitive activities. The law includes definitions of monopoly and market domination, and prevents firms from dominating the market. However, the Competition Law does not ban or prevent economic concentration, but controls this process to ensure equitable competition among business. The Law will take effect in 2005.

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<sup>229</sup> Sozzi, C.J., 'Project Finance and Facilitating Telecommunications Infrastructure Development in Newly-Industrializing Countries', Santa Clara Computer and High Tech. Law Journal, 1996, p.4.

<sup>230</sup> Winter, Nils, H.(ed), *How free are the Southeast Asian Markets*, Centre for Southeast Asian Studies, Åbo, Akademi University Press, 1994, p.179.

<sup>231</sup> Fforde, A. and de Vylder, S., 'From Plan to Market – the Economic Transition in Vietnam', Westview Press, 1996, p. 317.

Apart from the discrepancies in the existing laws that need to be eliminated, a drafting team is now putting together the uniformed Investment Law, which will be compiled from the existing laws on Domestic Investment Encouragement and the FIL, and is expected to be issued before the end of 2005.

### 7.3.4 Integrating Globally

Vietnam will be disadvantaged until it joins the WTO in terms of integrating into the global economy. The shadow of China, as a dominant manufacturing economy, is of course a challenge not to be underestimated by Vietnam. Vietnam has to find its own place and position on the global market and strengthen its competitiveness by further developing within the technological and industrial sectors. As Vietnam's economy is increasingly opening up, domestically produced goods and services will tend to adjust in relation to their international trading opportunity costs. The industry cannot continue to grow without outside financing or FDI.

The gap between Vietnam's achievements and its enormous potential remains large. It is a sustainable goal to let the private sector take some of the responsibility for infrastructure in the form of BOT-project which will free up the Vietnamese government funds to focus on those areas that the private sector can not finance. Hence, the central recommendation is to establish a legal framework for private participation in infrastructure (PPI). This has been done in a numerous other developing countries with a positive result.

## 7.4 Concluding Remarks

While the war between Vietnam and America is over, the battle for market share is just beginning, and these days everyone wants 'a piece of the action'. Private foreign investors and corporations looking for new markets, bring hard currency into the economy in addition to technology and training. New technology also enhances cost efficiency and the low production costs increases the revenues. However, within the business community there is a general consensus that Vietnam is an expensive place to do business. Corporations and investors that have the capital to endure prolonged development periods are best equipped and short-term speculation is not feasible in a market as Vietnam. Although, initially the investment will be unprofitable, it will definitely be rewarded by large returns in the future.

Governmental intervention and corruption combined with a weak, legal framework and considerable financial and management risks can be repulsive factors for a foreign investor. It is therefore essential that Vietnam focus on a few targets in the struggle of developing a communistic-based but capitalistic-driven nation. Vietnam as a unified country ought to:

1. strengthen the private sector by sharply reducing the role of the public sector;
2. prompt implementation of reform of major SOEs by liquidation or equitization;
3. initiate quick and bold adjustment of the current exchange rate to provide further flexibility and restore competitiveness;
4. reform the banking sector;
5. modernize the legal framework and aim at promoting domestic investment and attracting foreign capital;
6. establish a social safety net to cushion the adjustment shock on the population groups suffering from structural reforms.

What Vietnam needs is a liberal FDI policy with no limits on foreign ownership, no labour restrictions and no forced partnerships, particularly with SOEs.

# 8 Conclusions

## 8.1 Introduction

The impact of the Asian financial crisis in 1997 on Vietnam, which was to be noticed in the Vietnamese economy primarily in 1998 and 1999, may be traced to an inward-oriented development strategy lasting since earlier years, despite the initiatives taken in the Doi Moi.<sup>232</sup> The situation magnified internal weaknesses as the main cause of the country's economic slowdown, making it clear that decisive policy measures were badly needed, should the Vietnamese objective of becoming a financially sound welfare state ever be fulfilled. What was needed was foreign input by way of direct investment.

For countries in early stages of development, improvement of infrastructure is a certain means of stimulating economic growth. The BOT vehicle combines commercial benefits, such as capital contribution, know-how and technology transfer, with the opportunity to tangibly build a country. Another attractive feature is that BOT ensures government control over infrastructure at the end of the operation period.<sup>233</sup> This was recognized by the Vietnamese government; overcoming fears of foreign control over its infrastructure, BOT laws were incorporated into the legal system to help build essential public projects. For a nation in the course of development, the intra-organisational capacities provided by multinational corporations constitute an invaluable asset, making possible otherwise unattainable projects. Incentives for foreign investors, on the other hand, are expanding their markets and reducing production costs, for instance by means of lowering labour costs.<sup>234</sup> The evident interest foreign investors have shown in China and Eastern Europe suggests the substantial potential of breakthrough markets like Vietnam; nevertheless, investors will want to proceed with caution. The decision to invest in a foreign country also depends on other factors, discussed *supra* as, amongst others, political, currency and legal risks. Regarding the legal risk, arguably one of the more important aspects is the way in which disputes between the host country and foreign investors are resolved. When investors do find themselves in difficulties, they will want to have a reliable exit from an investment gone wrong; in most cases, the chosen form for this is by way of dispute settlement.

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<sup>232</sup> Tran-Nam, B. and Do Pham, C., *The Vietnamese Economy. Awakening the Dormant Dragon*, 2003, RoutledgeCurzon, London, p. 38.

<sup>233</sup> Malinasky, L.A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', 14 *Berkeley Journal of International Law* 438, 1996, p. 443.

<sup>234</sup> Tran-Nam, B. and Do Pham, C., *The Vietnamese Economy. Awakening the Dormant Dragon*, 2003, RoutledgeCurzon, London, p. 112.

## 8.2 Structural Legal Considerations

The Vietnamese legal system is still in the early stages of its development. Adoption of *Doi Moi* and the flurry of laws enacted since this new policy was implemented in 1986 appear to have initiated Vietnam's process of transformation to the rule of law. Still, however, the country has a long way to go; ironically, this is partly due to the degree of ambition with which reforms have been implemented. According to a report published in 2004 by the International Finance Corporation, the World Bank and the Mekong Private Sector Development Facility, Vietnam has one of the most complex incentive structures for foreign direct investment compared to incentive regimes and investor protection offered in Bangladesh, China, Malaysia, the Philippines and Thailand. This complexity is the result of successive amendments throughout the last decade. Many incentives are used to meet multiple objectives simultaneously; consequently, these multiple objectives have resulted in unnecessary complexity, confusing and contradicting in many cases. Substantial problems with legislative hierarchy, equity, definition and administration subsist.<sup>235</sup> Such lack of predictability and stability tends to make investors insecure and unwilling to jeopardize their assets; the importance of a predictable and stable legal structure in a prospective host state for foreign investment, certainly not least in the respect of dispute settlement, cannot be overstated. This is a question very much on the agenda for the Vietnamese government, and highly is debated in commercial *fora*. The following is an excerpt from the editorial on 16 November 2004, in the leading Vietnamese English-speaking newspaper. 'Market-based economics demand a legal system which encourages investors and entrepreneurs. When that legal system makes both the State and the private sector more efficient, everyone wins. As construction projects become increasingly larger and more complex, Vietnam will find itself importing foreign expertise. Keeping foreign investors happy with modern administrative procedures and transparent legislation will help generate more profits for this important sector in Vietnam's economy.'<sup>236</sup>

Attempting to predict how authorities and judges in today's Vietnam will interpret and apply new and untested laws is not only extremely difficult, it may prove a very hazardous guessing game as far as investors are concerned. As was discussed *supra* under chapter 2, a common practice for lawmakers in Vietnam, when addressed with an unfamiliar situation or problem, or where no formally enacted law regulating the specific matter at hand exists, is to apply other legislation by analogy. This type of theoretical exercise becomes even more questionable considering the niveau of legal knowledge among Vietnamese lawyers, even among the most influential actors in the Vietnamese legal system, due of course to the fact that law has not been practised in Vietnam, other than as a mere façade, for a very long

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<sup>235</sup> Vietnam News, 'Report Targets Complex, Contradictory Investment Incentives for Reforms', 2004-12-16.

<sup>236</sup> Vietnam News, 'Talking Law: Reforms Make Life Easier for Foreign Contractors', 2004-12-16.

time. Apart from the concerns about the objectivity of judges and assessors and the fairness of the court system *vis-à-vis* foreign investors in general, lacking legal security, then, is a risk that has to be taken into account. In short, for the foreign investor, patience and flexibility are the watchwords of the day.

Since business laws are not always applied, or are constantly changing, the volatile and unpredictable legal framework adds still more uncertainty to the legal aspect of the investment environment. Critics find Vietnamese authorities at this time to be constantly balancing socialistic and capitalistic ideology and approach, trying to find middle ways that are consistent with the country's political policy and at the same time approaching an inkling of western-style market economy. Nevertheless, in connection with reforms, government officials and the concerned public servants have shown an openness and willingness to accommodate and adjust to the need and expectations of foreign businesses. While the old-school communist rumblings of some still indicate a certain displeasure with the more market-friendly aspects of current reforms, it is a matter of fact that the country cannot evolve without the aid of foreign capital.

It is not unlikely that structural legal reform probably will lead to increased investment and facilitate the adoption of the rule of law. Nationalizing the BOT process, and eliminating the conflicting regulations and potential for corruption resulting from the power of local state bodies, will simplify the investment process, down to the dissolution of a cooperation landed in dispute. Since BOT projects involve substantial outlays of capital over a long period of time, investors naturally require stability where these issues are concerned, which can only be provided by the government. These risks to investors must be recognized on Vietnamese governmental level, and reduced or eliminated if or when possible.

The BOT laws can also be held to constitute an ideal starting-point for establishing the rule of law, seeing as how the BOT laws concern a very specific form of investment. Although other legal issues, such as the sensitive subject of land use, affect BOTs, it may very well prove possible to have these issues be addressed in the individual BOT agreements. The basic framework and regulations governing BOT projects should be further expounded to encourage the employment of the BOT vehicle by foreign enterprises in Vietnam. As it is today, BOT regulations provide only a broad outline for BOT governance. They delegate substantial discretionary power to numerous government bodies to provide the details necessary for implementation, which has resulted in BOT provisions being scattered amongst various different legislations, often giving conflicting directions and with no established internal hierarchy. What is needed is detailed and coherent, all-comprehensive and user-friendly regulations, so that investors may determine the viability of BOT projects in Vietnam and control the legal risks of investment. This would allow investors to support the badly

needed development of infrastructure and other essential features of a modern, functioning society, while Vietnam pursues systematic reform.<sup>237</sup>

### 8.3 Dispute Settlement

The main purpose of this thesis has been to investigate whether it is possible to safely settle a commercial dispute, with a degree of legal security adequate and acceptable to major international corporations in the role of foreign investors, in a political environment such as that of Vietnam. In order to illustrate the posed problem more poignantly, the dispute settlement context particularly focused on, has been where the state is one of the parties to the commercial dispute, here in connexion with BOT projects, seeing as how this is the most important form for foreign direct investment.

In the opinion of foreign investors, means of dispute resolution in Vietnam are not satisfactory.<sup>238</sup> This is hardly surprising, considering the practical problems discussed *supra* concerning choice of law, choice of forum and the question of enforcement, amongst other things. For policy reasons, - that is, a desire to sustain a certain degree of state control in commercial relationships - Vietnam has ignored the recent worldwide trend towards international arbitration. The current provisions on dispute resolution seem needlessly restrictive. Most importantly, the arbitration provisions for ancillary contracts discussed *supra* need to be made applicable for the whole of the BOT contract, so that parties may adopt freely any dispute settlement mechanism of their choice: the various alternative dispute resolution techniques, litigation, domestic arbitration, arbitration before an *ad hoc* tribunal, arbitration in a country of their choice or, the most common preference, arbitration handled by an international arbitration institution. There really is no valid excuse for restricting state party-private party dispute resolution to merely arbitration before an *ad hoc* tribunal set up by the parties. A greater degree of party autonomy in this respect would work very favourably in the legal risk estimate made by foreign investors, when considering becoming involved in transactions on the Vietnamese market.

For the same reason, the choice of law - or set of rules, when, for instance, the UNCITRAL Rules are considered by the parties - should be up to the parties. It is simply to be stated that international arbitration is the preferred dispute resolution alternative of most commercial actors, before both litigation and domestic arbitration, and really is the only realistic alternative to offer from any government's side. In conclusion, especially in a comparatively nascent legal system such as Vietnam's, there are simply too few qualified, independent and experienced lawyers, with the sufficient familiarity as to foreign practices and expectations, to handle commercial

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<sup>237</sup> Malinasky, L.A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', 14 Berkeley Journal of International Law 438, 1996, p. 459-460.

<sup>238</sup> Nam, B. and Do Pham, C., *The Vietnamese Economy. Awakening the Dormant Dragon*, 2003, RoutledgeCurzon, London, p. 115.



disputes; laws and procedures continue to be unclear and inconsistent, especially from a foreign party's point of view; there is also not the required level of jurisprudence or any researchable case law, and enforcement agencies remain insufficiently equipped to enforce judgements and awards.

Apart from this, arbitration has unique advantages over litigation as a means of resolving international commercial disputes. Compared to litigation, disputes usually are resolved more quickly and at lower cost, with little or no publicity. Other non-litigation alternatives, such as mediation or other alternative dispute resolution techniques, may also be used as even speedier and inexpensive adjuncts to, or instead of, formal arbitration.

Adequate dispute resolution and enforcement mechanisms are central to the adoption of the rule of law. Although Vietnam has made a great effort to join the global arbitral community, by, for instance, acceded to a number of international arbitration conventions during the last decennium, domestic courts still control which arbitral awards that are to be condoned with executive power.<sup>239</sup> Since there is no mechanism for administrative review, investors cannot be sure to receive a fair adjudication. State agencies on executive level often enjoy significant subjective discretion, which means that in practice, investors have very slim possibilities of attaining judicial review of decisions. It is no preposterous inference to make that much would be gained, both long-term and short-term, should Vietnam loosen its policy of strict state control of the settlement of commercial disputes where a state party is involved; it would be the ultimate show of goodwill towards the international commercial community to allow for international arbitration in these cases. As was said *supra*, obligatory domestic resolution of all disputes could be retained in the initial stage, as long as parties were offered review through international arbitration, in case the dispute settlement process should prove unsatisfactory.

## 8.4 In General

Finally, the prospects for BOT projects in general should be considered. Although Vietnam has adopted its BOT regime to encourage private infrastructure development, the value and utility of BOT remains virtually unknown. Since BOT developed as a type of project financing in the mid-1980s, scant history is available for consideration.<sup>240</sup> However, what may be gathered on a brief note, is that a BOT contract between a foreign-owned enterprise and the Vietnamese government appears to work best for foreign investors prepared to invest large-scale and long-term. Then, the investor has the benefit of controlling management decisions, and also has a strong incentive to operate efficiently, due to the limited duration of the project, coupled with a high degree of financial risk. The reward is a substantial return on capital. In conclusion, companies that might suitably consider

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<sup>239</sup> Malinasky, L.A. 'Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam', 14 Berkeley Journal of International Law 438, 1996, p. 459.

<sup>240</sup> *Ibid*, p. 460.

engaging themselves in BOT projects ought to be financially and organizationally strong. In addition, the few BOT projects that have been completed so far have shown that private investors perform decidedly better than the public sector in terms of investment, capacity expansion, service delivery and efficiency.

The growing pains of BOT itself may affect the use of BOT in Vietnam. Neither investors nor the Vietnamese government should avoid the BOT form for these reasons, which has fortunately not been the case: seven sizeable infrastructure projects are to be initiated in Vietnam during 2005, at a total cost of VND 22.3 trillion (US\$ 1.4 billion), for instance the French-Vietnamese BOT project to build a 11.87 km long tram route in Hanoi.<sup>241</sup> In fact, the relative immaturity of the instrument could improve its ability to adapt to new situations and changed conditions. Fortunately, the usefulness of the BOT vehicle when it comes to developing the infrastructure and other essential public-sector facilities in a rapidly advancing nation such as Vietnam, has been adequately realized by the Vietnamese government. There is simply no better way of achieving the goal of stimulating economic growth, in terms of providing the necessary prerequisites by building infrastructure; beneficial synergy effects such as, for instance, know-how and technology transfer not to be despised. While it is unlikely that all of the factors that have hindered implementation of BOT projects so far will be resolved in the near future, the foundations have definitely been established. Given the country's needs, BOT arrived just in time for Vietnam.

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<sup>241</sup> Vietnam News, 'Seven Infrastructure Projects to Begin Next Year', 2004-12-13, p. 1.

# Supplements

## 8.5 Appendix A

### Excerpts from Decree on Build-Operate-Transfer (BOT) Contracts (Decree 87-CP)

Promulgating the Regulations on Investments in the Form of Build-Operate-Transfer (BOT) Contracts The Government Pursuant to the Law on the Organization of the Government dated 30 September 1992; Pursuant to the Law on Foreign Investment in Vietnam dated 29 December 1987 and the Laws on Amendment of and Addition to a Number of Articles of the Law on Foreign Investment dated 30 June 1990 and 23 December 1992; In order to encourage investments in construction and development of infrastructure in Vietnam; On the basis of the recommendations of the Minister-Chairman of the State Committee for Co-operation and Investment; Decrees:

#### **Article 1**

To issue with the Decree the Regulations on Investments in the Form of Build-Operate-Transfer Contracts (abbreviated as BOT).

#### **Article 2**

All ministers, heads of ministerial equivalent bodies and bodies of the Government, and chairmen of people's committees of provinces and cities under central authority shall be responsible for the implementation of this Decree.

#### **Article 3**

This Decree shall be of full force and effect as of its date of issue.

## 8.6 Appendix B

### Excerpts from Regulations on Investments in the Form of Build-Operate-Transfer Contracts Issued with Decree 87-CP dated 23 November 1993 of the Government)

#### Chapter 1

#### GENERAL PROVISIONS

#### **Article 1**

In these Regulations, the following shall have the meanings ascribed to Them hereunder:

1. Build-Operate-Transfer project (abbreviated in English as BOT) means any project approved by the Government for the purpose of constructing and carrying on business of operating infrastructure projects (including expanding, upgrading, and modernizing) and other projects which are permitted by the Government to be carried out in the form of BOT contract within a predetermined period in accordance with these Regulations. Upon

the expiry of the duration, the project shall be transferred to the Government of Vietnam without compensation.

2. BOT company means a company with foreign owned capital incorporated in accordance with the laws of Vietnam to carry out a BOT project.

#### **Article 2**

1. The Government of Vietnam encourages all foreign organizations and individuals to invest capital and technology in the form of a BOT contract. The Government shall protect the right of ownership of invested capital, ensure other legal rights of foreign organizations and individuals, and create favourable conditions and simple procedures for foreign organizations and individuals to carry out BOT projects in Vietnam.

### Chapter II

#### PREFERENTIAL TREATMENT AND INVESTMENT GUARANTEE

#### **Article 9**

Tolls, fees, or other revenue derived from the operation of the BOT project must be stipulated in the BOT contract. Thirty (30) days prior to any increase in tolls, fees, or other charges within the proposed and agreed range stipulated in the BOT contract or any reduction of tolls, fees, or other charges, the State Committee for Co-operation and Investment must be notified by the BOT company of such increase or reduction. Where the intended increase in tolls, fees, or other charges is higher than the proposed and agreed ceiling level in the BOT contract, the BOT company shall submit its proposal to the State Committee for Co-operation and Investment for consideration and decision.

### Chapter III

#### METHODS OF CARRYING OUT BOT PROJECTS

#### **Article 11**

1. In accordance with objectives for social and economic development, the State Committee for Co-operation and Investment shall, in conjunction with the State Planning Committee, the relevant ministries and bodies of the Government and the people's committees of provinces and cities under central authority, formulate plans and a list of BOT projects for the purpose of attracting investment. The State Committee for Co-operation and Investment shall, in conjunction with the relevant ministries and bodies of the Government, and the people's committees of provinces and cities under central authority in which a BOT project is located, administrate and provide guidelines for the implementation of the BOT project. On the basis of proposals of foreign investors, certain BOT projects which are not listed above may be approved by the Government.

2. Depending on the nature and scale of the BOT project, the Government shall select one of the following methods: a tender, a selection of contractors, or direct negotiation with a foreign investor.

### **Article 13**

1. The duration of operation of the BOT project shall be stated in the contract and stipulated in the investment license in accordance with article 15 of the Law on Foreign Investment in Vietnam.
3. Upon the expiry of the duration of operation of the project, a BOT company shall transfer the whole of the BOT project, without compensation, to the Vietnamese Government.

## Chapter IV

### **BOT CONTRACT, ANCILLARY CONTRACTS, AND BOT INVESTMENT LICENCE**

### **Article 15**

1. Disputes relating to the performance of ancillary contracts entered into between the BOT company and ancillary contractors shall first be resolved by way of negotiation and conciliation. Where the dispute remains unresolved after negotiation, then, on the basis of an agreement between the parties, the dispute shall be referred to an arbitration body of Vietnam, an ad-hoc arbitrator established by both parties, an arbitration body of a third country, or an international arbitration tribunal.
2. Disputes between the State body authorized to enter into a BOT contract and the investors or the BOT company in respect of the performance of the contract shall be resolved through negotiation and conciliation. Where the dispute is not resolved by way of negotiation and conciliation, the parties to the dispute shall refer it to an ad-hoc arbitrator established by the parties for resolution. The procedure to be carried out by the arbitrator shall be determined by both parties on the basis of agreement.
3. The parties to the dispute shall agree on the laws which will govern resolution of the dispute.
4. The decision of the arbitrator shall be enforced in accordance with the laws of Vietnam.

## Chapter V

### **PROVISIONS ON IMPLEMENTATION**

### **Article 18**

The Minister-Chairman of State Committee for Co-operation and Investment, the Minister-Chairman of State Planning Committee, the Ministers of Energy, Heavy Industry, Transport, Construction, Finance, Trade, and Science, Technology and Environment, the Governor of the State Bank, and the general directors of the General Department for Land Management and other governmental bodies shall, depending on their functions and powers, be responsible for the promulgation of guidance provisions on the implementation of these Regulations.

## 8.7 Appendix C

### **The 1992 Constitution of the Socialist Republic of Vietnam**

#### Chapter II

#### ECONOMIC SYSTEM

##### **Article 22**

Production and trading enterprises belonging to all components of the economy must fulfil all their obligations to the State; they are equal before the law; their capital and lawful property shall receive State protection. Enterprises belonging to all components of the economy can enter into joint ventures and partnership with individuals and economic organizations at home and abroad in accordance with the provisions of the law.

##### **Article 23**

The lawful property of individuals and organizations shall not be nationalised. In cases made absolutely necessary by reason of national defence, security and the national interest, the State can make a forcible purchase of or can requisition pieces of property of individuals or organizations against compensation taking into account current market prices. The formalities of the forcible purchase or requisition shall be determined by law.

##### **Article 25**

The State encourages foreign organizations and individuals to invest funds and technologies in Vietnam in conformity with Vietnamese law and international law and usage; it guarantees the right to lawful ownership of funds, property and other interest by foreign organization and individuals. Enterprises with foreign investments shall not be nationalized. The State creates favourable conditions for Vietnamese residing abroad to invest in the country.

#### Chapter III

#### CULTURE, EDUCATION, SCIENCE, TECHNOLOGY

##### **Article 31**

The State shall create favourable conditions for the citizens to develop all-sidedly; it shall undertake civic education and urge people to live and work in accordance with the Constitution and the law, to set up families that are cultures and happy, marked by patriotism, love of socialism, a genuinely internationalist spirit, friendship and cooperation with all nations in the world.

## Chapter X

### THE PEOPLE'S COURT AND THE PEOPLE'S OFFICE OF SUPERVISION AND CONTROL

#### **Article 126**

It is the duty of the People's Court and the People's Office of Supervision and Control to, within the bounds of their functions, safeguard socialist legality, the socialist regime and the peoples mastery, the property of the State and the collectives, the lives, property, freedom, honour and dignity of the citizen.

## 8.8 Appendix D

### **The Law on Foreign Investment in Vietnam**

#### Chapter 1

#### GENERAL PROVISIONS

##### **Article 1**

The State of the Socialist Republic of Vietnam encourages foreign investors to invest in Vietnam on the basis of respect for the independence and sovereignty of Vietnam, observance of its law, equality and mutual benefit. The State of Vietnam protects the ownership of invested capital and other legal rights of foreign investors, provides favourable conditions and formulates simple and prompt procedures for foreign investors investing in Vietnam.

##### **Article 2**

In this Law, the following terms shall have the meaning ascribed to them hereunder:

1. *Foreign direct investment* means the bringing of capital into Vietnam in the form of money or any asset by foreign investors for the purpose of carrying on investment activities in accordance with the provisions of this Law.
2. *Foreign investor* means a foreign economic organization or individual investing in Vietnam.
3. *Foreign party* means one party comprising one or more foreign investors.
4. *Vietnamese party* means one party comprising one or more Vietnamese enterprises from any economic sector.
5. *Two parties* means the Vietnamese party and the foreign party. *Multi-party* means a Vietnamese party and more than one foreign party, or a foreign party and more than one Vietnamese part, or more than one Vietnamese party and more than one foreign party.
6. *An enterprise with foreign owned capital* includes a joint venture and an enterprise with one hundred (100) per cent foreign owned capital.

7. A *joint venture enterprise* means an enterprise established in Vietnam by two or more parties on the basis of a joint venture contract or an agreement between the Government of the Socialist Republic of Vietnam and a foreign government, or an enterprise established on the basis of a joint venture contract between an enterprise with foreign owned capital and a Vietnamese enterprise or between a joint venture enterprise and a foreign investor.

8. An *enterprise with one hundred (100) per cent foreign owned capital* means an enterprise in Vietnam the capital of which is one hundred (100) per cent invested by foreign investor(s).

9. A *business co-operation contract* means a written document signed by two or more parties for the purpose of carrying on investment activities without creating a legal entity.

10. A *joint venture contract* means a written document signed by the parties referred to in Item 7 of this Article for the establishment of a joint venture enterprise in Vietnam.

11. A *build-operate-transfer contract* means a written document signed by an authorized State body of Vietnam and a foreign investor(s) for the construction and commercial operation of an infrastructure facility for fixed duration; upon expiry of the duration, the foreign investor(s) shall, without compensation, transfer the facility to the State of Vietnam.

12. A *build-transfer-operate contract* means a written document signed by an authorized State body of Vietnam and a foreign investor(s) for the construction of an infrastructure facility; upon completion of construction, the foreign investor shall transfer the facility to the State of Vietnam and the Government of Vietnam shall grant the investor the right to operate commercially the facility for a fixed duration in order to recover the invested capital and gain reasonable profits.

13. A *build-transfer contract* means a written document signed by an authorized State body of Vietnam and a foreign investor(s) for the construction of an infrastructure facility; upon completion of construction, the foreign investor shall transfer the facility to the State of Vietnam and the Government of Vietnam shall create conditions for the foreign investor to implement other investment projects in order to recover the invested capital and gain reasonable profits.

14. An *export processing zone* means an industrial zone specializing in the production of exports and the provisions of services for the production of exports and export activities with specified boundaries established, or permitted to be established, by the Government.

15. An *export processing enterprise* means an enterprise which specializes in the production of exports and the provisions of services for the production of exports and export activities and which is established and operated in accordance with the regulations of the Government on export processing enterprises.

16. An *industrial zone* means a zone which specializes in the production of industrial goods and the provisions of services for the industrial production established, or permitted to be established by the Government of Vietnam.

17. An *industrial zone enterprise* means an enterprise established and operated within an Industrial Zone.



18. *Invested capital* means the capital required to implement an investment project, including legal capital and loan capital.

19. *Legal capital* of an enterprise with foreign owned capital means the capital required to establish the enterprise as stated in its charter.

20. *Capital contribution* means the capital contributed by one party to the legal capital of an enterprise.

21. *Reinvestment* means using profits and other lawful earnings from investment activities in Vietnam to invest in projects which are being implemented or to make new investments in Vietnam under any of the forms stipulated in this Law.

### **Article 3**

Foreign investors may invest in Vietnam in sectors of its national economy. The State of Vietnam encourages foreign investors to invest in the following sectors and regions:

1. Sectors:

a. Production of exports;

b. Husbandry, farming and processing of agricultural produce, forestry, and aquaculture;

c. utilization of high technology and modern technology and modern techniques, protection of ecological environment, and investment in research and development;

d. Labour intensive activities, processing of raw materials and efficient utilization of natural resources in Vietnam;

e. Construction of infrastructure facilities and important industrial production establishments.

2. Geographical areas:

a. Geographical areas with difficult socio-economic conditions;

b. Geographical areas with exceptionally difficult socio-economic conditions.

The state of Vietnam will not license any foreign investment project in sectors or geographical areas, which may have adverse effects on national defence, national security, cultural and historical heritage, fine custom and tradition, or the ecological environment.

Based on the development planning and orientation for each period, the Government shall stipulate the geographical areas in which investment is encouraged and shall issue lists of encouraged investment projects and specially encouraged investment projects, lists of sectors in which licensing of investment is conditional, and list of sectors in which investment will not be licensed.

Private Vietnamese economic organizations shall be permitted to co-operate with foreign investors in sectors, subject to conditions stipulated by the government.

## Chapter II

### FORMS OF INVESTMENT

#### **Article 4**

Foreign investors may invest in Vietnam in any of the following forms:

1. Business co-operation on the basis of a business co-operation contract;
2. Joint venture enterprise;
3. Enterprise with one hundred (100) per cent foreign-owned capital.

#### **Article 5**

Two or more parties may, on the basis of business co-operation contract, enter into a business co-operation, such as profit sharing production, product sharing co-operation, or other business co-operation.

The parties shall agree on, and expressly state in the business co-operation contract, the objects, nature and duration of the business, their respective rights, obligations and responsibilities, and the relationship between them.

#### **Article 6**

Two or more parties may, on the basis of a joint venture contract, co-operate to establish a joint venture enterprise in Vietnam.

A joint venture enterprise may co-operate with foreign investor(s) or Vietnamese enterprises to establish a new joint venture enterprise in Vietnam.

A joint venture enterprise shall be established in the form of a limited liability company and shall be a legal entity in accordance with the law of Vietnam.

#### **Article 7**

1. The Foreign party to a joint venture enterprise may make its contribution to the legal capital in:
  - a. Foreign currency or Vietnamese currency originating from investments in Vietnam;
  - b. Equipment, machinery, plant and other construction works;
  - c. The value of industrial property, technical know-how, technological processes and technical services.
2. The Vietnamese party to a joint venture enterprise may make its contribution to the legal capital in:
  - a. Vietnamese currency or foreign currency;
  - b. The value of the right to use land in accordance with the law on land;
  - c. Resources, the value of the right to use water and sea surfaces in accordance with the law;
  - d. Equipment, machinery, plant and other construction works;
  - e. The value of industrial property rights, technical know-how, technological processes and technical services.

3. Capital contribution made by the parties in forms other than those stipulated in Clauses 1 and 2 of this Article must be approved by the Government.

#### **Article 8**

Capital contribution of a foreign party or foreign parties to the legal capital of a joint venture enterprise shall be agreed by the parties and shall not be limited provided that the contribution is not less than thirty (30) per cent of the legal capital, except in cases stipulated by the Government.

In the case of a multi-party joint venture enterprise, the minimum capital contribution to be made by each Vietnamese party shall be determined by the Government.

With respect to important economic establishments as determined by the government, the parties shall agree to increase gradually the proportion of the Vietnamese party's contribution to the legal capital of the joint venture enterprise.

#### **Article 9**

The value of the capital contribution made by each party to a joint venture enterprise shall be calculated by reference to the market price at the time of contribution. The capital contribution schedule shall be agreed by the parties, stated in the joint venture contract and approved by the body in charge of State management of foreign investment.

The value of equipment and machinery contributed as capital must be certified by independent inspection organization.

The parties shall be responsible for the truth and accuracy of the value of their respective capital contributions. Where necessary, the body in charge of State management of foreign investment has the right to appoint an inspection organization to revalue the capital contribution of each party.

#### **Article 10**

The parties shall share the profits and bear the risks associated with a joint venture enterprise in proportion to their respective capital contribution, except where it is otherwise agreed by the parties as stated in the joint venture contract.

#### **Article 11**

The board of management shall be the body in charge of the management of the joint venture enterprise and shall comprise representatives of the parties to the joint venture enterprise.

Each party to a joint venture enterprise shall appoint members to the Board of management in proportion to its capital contribution to the legal capital of the joint venture enterprise.

In the case of a two-party joint venture enterprise, each party shall have at least two members on the Board of Management.

In the case of a multi-party joint venture, each part shall have at least one member on the Board of management.

If a joint venture enterprise has one Vietnamese party and more than one foreign party, or one foreign party and more than one Vietnamese party, the Vietnamese or foreign party concerned shall have the right to appoint at least two members to the Board of Management.

In respect of joint venture enterprise established by an existing joint venture enterprise in Vietnam and foreign investor or a Vietnamese enterprise, the existing joint venture enterprise shall have at least two members on the Board of Management, one of whom must be appointed by the Vietnamese party.

#### **Article 12**

The chairman of the Board of Management shall be appointed by the parties to the joint venture enterprise. The chairman of the Board of Management shall be responsible for convening and chairing meetings of the Board of Management and for monitoring the execution of any resolutions of the Board of Management.

The general director and deputy general directors shall be appointed and dismissed by the Board of Management. They shall be responsible before the Board of Management and the law of Vietnam for the managements and running of the operations of the joint venture enterprise.

The general director or the first deputy general director shall be a Vietnamese citizen.

The duties and powers of the chairman of the Board of Management, the general director and the first deputy general directors shall be stated in the charter of the joint venture enterprise.

#### **Article 13**

The Board of Management shall decide on regular meetings. Extra-ordinary meetings of the Board of Management may be convened at the request of the chairman of the Board of Management, two thirds of the board members, the general director or the first deputy general director. Meetings of the Board of Management shall be convened by the chairman of the Board of Management.

Meetings of the Board of Management must have a quorum of at least two thirds of the members of the Board of Management representing all the parties to the joint venture.

**Article 14**

1. The most important issues in the organization and operation of a joint venture enterprise include: the appointment and dismissal of the General Director, the first Deputy General Director; the amendment and supplement to the enterprise's charter, shall be decided by the Managing Board on the principle of consensus among the Managing Board's members present at its meeting. The joint-venture parties may agree in the enterprise's charter upon the other matters, which should be decided on the principle of consensus.
2. with respect to matters which are not referred to in Clause 1 of this Article, the Board of Management shall decide on the basis of the principle of simple majority voting by members who are present at the meeting.

**Article 15**

Foreign investors may establish in Vietnam an enterprise with one hundred (100) per cent foreign owned capital.

An enterprise with one hundred (100) per cent foreign owned capital shall be established in the form of limited liability company and shall be a legal entity in accordance with law of Vietnam.

An enterprise with one hundred (100) per cent foreign owned capital may co-operate with a Vietnamese enterprise to establish a joint venture enterprise.

With respect to important economic establishments as determined by the Government, Vietnamese enterprises shall, on the basis of agreements with the owners of the enterprise, be permitted to purchase a part of the capital of the enterprise to convert such enterprise into a joint venture enterprise.

**Article 16**

The legal capital of an enterprise with foreign owned capital must be at least thirty (30) per cent of its invested capital. In special cases and subject to approval of the body in charge of State management of foreign investment, this proportion may be lower than thirty (30) per cent.

During the course of its operation, an enterprise with foreign owned capital must not reduce its legal capital.

**Article 17**

The duration of an enterprise with foreign owned capital and the duration of a business co-operation contract shall be stated in the investment license for each project in accordance with regulations of the Government, but shall not exceed fifty (50) years.

Pursuant to regulations made by the Standing Committee of the National Assembly, by the Government may, on a project by project basis, grant a longer duration but the maximum duration shall not exceed (70) years.

**Article 18**

Foreign investors may invest in industrial zones and export processing zones in any of the investment forms stipulated in Article 4 of this Law.

Vietnamese enterprises in any economic sector may co-operate with foreign investors to invest in industrial zones and export processing zones in any of the investment forms stipulated in Clauses 1 and 2 of Article 4 of this Law or may establish their wholly owned enterprises.

The transfer of goods between enterprises operating in the Vietnamese market and export processing enterprises shall be deemed to be an export-import activity and shall be regulated by the provisions of law on export and import. The Government shall provide simple and convenient procedures for export processing enterprises to purchase raw materials and other goods from the Vietnamese market.

The Government shall make regulations on industrial zones and export processing zones.

**Article 19a**

Foreign-invested enterprises and parties to a business co-operation contracts shall, in the course of operation, be entitled to alter their investment forms or conduct the enterprise division, separation, merger and/or amalgamation.

The Government shall prescribe the conditions and procedures for the investment form alteration and the enterprise division, separation, merger and/or amalgamation.

**Article 19**

Foreign investors investing in construction of infrastructure facilities may enter into Build-Operate-Transfer contracts, Build- Transfer - Operate contracts, or Build- Transfer contracts with an authorized State of body in Vietnam. Foreign investors shall be entitled to the rights and be subject to the obligation stipulated in such contract.

The Government shall make detailed regulations on investment on the basis of Build-Operate-Transfer contracts, Build- Transfer - Operate contracts, and Build- Transfer contracts.

**Chapter III****INVESTMENT GUARANTEE MEASURES****Article 20**

The State of the socialist Republic of Vietnam shall guarantee that foreign investors investing in Vietnam are treated fairly and equitably.

**Article 21**

Throughout the process of investment in Vietnam, foreign investors' lawful capital and other assets shall not be requisitioned or confiscated, by means

of administrative measures, and foreign-invested enterprises shall not be nationalized.

The State of the socialist Republic of Vietnam shall protect the industrial property rights and ensure the legitimate interests of foreign investors in their technology transfer activities in Vietnam.

**Article 22 a**

1. In cases where a change in provisions of Vietnamese law causes damage to interests of foreign-invested enterprises and parties to business co-operation contracts, such foreign-invested enterprises and parties to business co-operation contracts shall continue to enjoy preferences already provided for in their investment licenses and this Law or have their damaged interests satisfactorily settled by the State through the following measures:

- a. Change of projects' operation objectives;
- b. Tax exemption and/or reduction as provided for by law;
- c. Damage incurred by foreign-invested enterprises and parties to business co-operation contracts shall be cleared against such enterprises' taxable incomes;
- d. They shall be considered for satisfactory compensations in a number of cases of necessity.

2. More preferential provisions which are promulgated after the investment licenses are granted shall be applicable to foreign-invested enterprises and parties to business co-operation contracts.

**Article 22**

Foreign investors investing in Vietnam shall have the right to transfer abroad:

1. Their profits derived from business operations;
2. payments received from the provisions of technology and services;
3. The principal of and interest on any foreign loan obtained during the course of operation;
4. The invested capital;
5. Other sums of money and assets lawfully owned.

**Article 23**

Foreigners working in Vietnam for enterprises with foreign-owned capital and parties to business co-operation contracts shall, after payment of income tax as stipulated by law, be permitted to transfer abroad their lawful incomes.

**Article 24**

Any dispute between the parties to a business co-operation contract, between the parties to a joint venture contract, or between enterprises with foreign owned capital or parties to a business co-operation contract and Vietnamese enterprises must firstly be resolved by negotiation and conciliation.

Where the parties fail to settle the dispute by way of conciliation the dispute shall be referred to a Vietnamese arbitration body or a Vietnamese court in accordance with the law of Vietnam.

With respect to disputes between parties to a joint venture enterprise or a business co-operation contract, the parties may agree in the contract to appoint another arbitration body to resolve the dispute.

Any disputes arising from a Build-Operate-Transfer contract, Build-Transfer-Operate contract, and Build-Transfer contract shall be resolved in accordance with the dispute resolution mechanism agreed by the parties and stated in the contract.

#### Chapter IV

### RIGHTS AND OBLIGATIONS OF FOREIGN INVESTORS AND ENTERPRISES WITH FOREIGN OWNED CAPITAL

#### **Article 25**

Enterprises with foreign owned capital and parties to a business co-operation contract shall have the right to recruit and employ labour in accordance with its business requirements and must give priority to Vietnamese citizens; shall only recruit and employ foreigners for jobs which require a level of technical and management expertise which a Vietnamese citizen cannot satisfy but must train Vietnamese citizens as replacements.

The rights and obligations of an employee of an enterprise with foreign owned capital shall be ensured by the labour contract, the collective labour agreement and the provisions of the law on labour.

#### **Article 26**

Employers and foreign and Vietnamese employees must comply with the provisions of the law on labour and other relevant legislation, and respect the honour, dignity and traditional customs of each other.

#### **Article 27**

Enterprises with foreign owned capital must respect the rights of Vietnamese employees to participate in a political organization and socio-political organizations in accordance with the law of Vietnam.

#### **Article 28**

Enterprises with foreign owned capital and parties to a business co-operation contract must purchase insurance cover for property and civil liabilities from Vietnamese insurance companies or other insurance companies permitted to operate in Vietnam.

#### **Article 29**

The transfer of foreign technology to Vietnam in Foreign investment projects may be carried out in the form of capital contribution of the value of technology or technology purchases made on the basis of a contract in accordance with the law on technology transfer.



The Government in Vietnam encourages accelerated transfers of technology, especially those advanced technology.

#### **Article 30**

Enterprises with foreign owned capital and parties to a business co-operation contract must, following completion of capital construction for the establishment of the enterprise, undertake a construction audit and prepare a financial statement of statement of construction works which must be certified by an inspection organization.

Enterprises with foreign owned capital and parties to a business co-operation contracts must carry out tenders in accordance with the provisions of the law on tendering.

#### **Article 31**

Enterprises with foreign owned capital and parties to a business co-operation contracts shall have the right to autonomy in conducting their businesses in accordance with the objectives stipulated in the investment license; to import equipment, machinery, materials and means of transport; to export and sell either directly, or through an agent, their in order to implement their investment projects in accordance with the law.

Enterprises with foreign owned capital and parties to a business co-operation contract must give priority to purchasing equipment machinery, materials and means of transport; to export in Vietnam where the technical and commercial conditions are similar.

#### **Article 32**

An enterprise with foreign-owned capital may establish branches outside the province or city under central authority in which its head office is located to carry business activity within the scope and objectives stipulated in the investment license provided that the approval of the people's committee of the province or city under central authority in which the branch is to be located is obtained.

#### **Article 33**

Foreign-invested enterprises and parties to business co-operation contracts shall be entitled to buy foreign currencies at commercial banks to satisfy the requirements of their current transactions and other permitted transactions according to provisions of the legislation on foreign exchange management.

#### **Article 34**

The parties to a joint-venture enterprise shall be entitled to transfer the value of their capital contribution share therein, but priority must be given to other parties to the joint-venture enterprise. In cases where it is transferred to enterprises outside the joint venture, the transfer conditions must not be favourable than those set for the parties to the joint-venture enterprise. The capital transfer must be agreed upon by the parties to the joint-venture enterprise.

The provisions shall also apply to the transfer of rights and obligations of parties to business co-operation contracts. Foreign investors in enterprises with 100% foreign investment capital shall also be entitled to transfer their capital.

In cases where the capital transfer yields profits, the transferor shall have to pay enterprise income tax at the rate of 25 %.

#### **Article 35**

An enterprise with foreign owned capital shall open bank accounts in both Vietnamese currency and foreign currency at Vietnamese banks or joint venture banks or foreign bank branches established in Vietnam.

In special cases where it is agreed to by the Vietnam State Bank, foreign-invested enterprises are entitled to open accounts abroad.

#### **Article 36**

The conversion of Vietnamese currency into foreign currency shall be effected at the official exchange rate published by the State Bank of Vietnam at the time of conversion.

#### **Article 37**

An enterprise with foreign owned capital and a foreign party to a business co-operation contract shall apply the Vietnamese accounting system. The approval of the Ministry of Finance must be obtained if another common accounting system is applied.

Depreciation of fixed assets of enterprises with foreign owned capital and foreign parties to business co-operation contracts shall be carried out in accordance with the regulations of the Government.

Annual financial statements of enterprises with foreign owned capital and foreign parties to business co-operation contracts shall be audited by an independent Vietnamese auditing company or another independent auditing company permitted to operate in Vietnam in accordance with the provisions of the law on auditing. Annual financial statements must be sent to the State financial body and the body in charge of State management of foreign investment.

#### **Article 38**

Enterprises with foreign owned capital and foreign parties to a business co-operation contracts shall be subject to profits tax at a rate of twenty five (25) per cent on the profits earned; where investment is encouraged, the rate of profits tax shall be twenty (20) per cent on the profits earned. Where the investment satisfies many investment promotion criteria, the rate of profits tax shall be fifteen (15) per cent on the profits earned. Where the investment is specially encouraged, the rate of profits tax shall be ten (10) per cent on the profits earned.

For investments in oil and gas industry and a number of other rare and precious resources, the rate of profits tax shall in accordance with the provisions of the Law on Petroleum and other relevant legislation.

**Article 39**

Depending on the investment sector and geographical area as stipulated in Article 3 of this Law, an enterprise with foreign owned capital and foreign party to a business co-operation contract may be exempted from profits tax for a maximum period of two years commencing from the first profit-making year and may be entitled to a fifty (50) per cent reduction of profits tax for a maximum period of two (2) successive years.

Enterprises with foreign owned capital and foreign parties to business co-operation contracts implementing a project which satisfies many investment promotion criteria shall be exempted from profits tax for a maximum period of four (4) years commencing from the first profit-making year and may be entitled to a fifty (50) per cent reduction of profits tax for a further maximum period of four (4) years.

For cases where investment is specially encouraged, exemption from profits tax may be allowed for a maximum period of eight (8) years.

**Article 40**

Foreign-invested enterprises and parties to business co-operation contracts, which suffer from losses after making final tax settlement with the tax agency, shall be entitled to carry forward their losses the following year, and such losses shall be cleared against the taxable incomes. The period during which losses can be carried forward shall not exceed 5 years.

**Article 41**

After paying enterprise income tax and fulfilling other financial obligations, the deductions from their remaining income to set up reserve funds, welfare funds, production expansion funds and other funds shall be decided by enterprises.

**Article 42**

Where reinvestment is made in encouraged investment projects, the total or a part of the profits tax paid in respect of the reinvested profits shall be refunded. The Government shall stipulate the percentage of profits tax to be refunded in respect of the reinvested profits depending on the investment sector and geographical area and the form and duration of the reinvestment.

**Article 43**

Upon remitting his/her/its profit abroad, a foreign investor shall have to pay a tax representing 3%, 5% or 7% of the remitted profit, depending on the level of capital contribution by the foreign investor to the legal capital of the foreign-invested enterprise or capital for performance of the business co-operation contract.

**Article 44**

Overseas Vietnamese who invest in Vietnam according to the provisions of this Law shall enjoy the 20% reduction of enterprise income tax as compared to projects of the same kind, except in cases where the enterprise income tax rate of 10% applies; they shall be entitled to the tax rate of 3% of the profit amount remitted abroad for remittance of their profits abroad.

**Article 45**

Pursuant to Government regulations, the body in charge of State management of foreign investment shall apply the profits tax rates, the periods of exemption from and reduction of profits tax, and the withholding tax rates in accordance with Article 38, 39, 43 and 44 of this Law. Tax rates and periods of exemption from and reduction of tax shall be specified in the investment license.

If the investment conditions change during the implementation of an investment project, the exemption from or reduction of taxes applicable to the enterprise with foreign owned capital or the foreign party to a business co-operation contract shall be determined by the Ministry of Finance.

**Article 46**

1. Foreign-invested enterprises and parties to business co-operation contracts that use land, water and/or sea surface shall have to pay rental therefore. In cases where they exploit natural resources, they shall have to pay natural resources tax as prescribed by law. The Government stipulates the exemption or reduction of land, water and sea surface rental for build-operate-transfer, build-transfer-operate and build-transfer projects for investment in areas with exceptionally difficult socio-economic conditions.
2. In cases where the Vietnamese part contributes capital with the land use right value, it shall have to make compensation for ground clearance and complete the procedures to obtain land use right. In cases where the Vietnamese State leases land, the People' Committees of the provinces and centrally-run cities where investment projects are executed shall organize the payment of compensations ground clearance and completion of the procedures for land leases.
3. Foreign-invested enterprise shall be entitled to mortgage assets affixed to land use right value to secure loans borrowed from credit institutions licensed to operate in Vietnam. The Government prescribes the conditions and procedures for foreign-invested enterprises to mortgage the land use right.

**Article 47**

1. Export tax and import tax imposed on goods exported and/or imported by foreign-invested enterprises and parties to business co-operation contracts shall comply with the Law on Export Tax and Import tax.
2. Foreign-invested enterprises and foreign parties to business co-operation contracts shall be exempted from import tax for goods imported to create fixed assets, including:
  - a. Equipment and machinery;

- b. Specialized transport means included in technological lines and transport means for carrying workers to/from working places;
  - c. Components, details, knocked down parts, spare parts, fitting and assembling parts, models and accessories accompanying equipment, machinery, specialized transport means specified at point b of this Clause.
  - d. Raw materials and materials used for manufacture of equipment, machinery in technological lines or manufacture of components, details, knocked down parts, spare parts, fitting and assembling parts, models and accessories accompanying equipment and machinery;
  - e. Construction supplies which cannot be produced at home. The exemption of import tax of import goods specified in this Clause shall also be applicable to cases of projects' scope expansion or technological alteration or renewal.
3. Raw materials, materials and components imported for production by projects in fields where investment is especially encouraged or in geographical areas meeting with exceptionally difficult socio-economic conditions shall be exempted from imported tax for five (5) years from the date of commencing the production.
4. The government shall provide for the exemption and reduction of export tax and import tax for other special goods that need investment encouragement.

#### **Article 48**

An export processing enterprise shall be entitled to exemption from export duty on goods exported from an export processing zone to a foreign country or import duty goods imported into an export processing zone from a foreign country.

Export processing enterprises and enterprises with foreign owned capital in industrial zones shall be entitled to preferential tax rates in cases where investment is encouraged or specially encouraged in accordance with Article 38, 39, 43, and 44 of this Law. The Government shall provide for preferential tax rates applicable to each kind of export processing enterprise and enterprise with foreign owned capital in industrial zones.

#### **Article 49**

In addition to the types of tax stipulated in this Law, an enterprise with foreign owned capital and a foreign party to a business co-operation contract must pay other taxes in accordance with law.

#### **Article 50**

Foreign and Vietnamese personnel working in an enterprise with foreign owned capital or for parties to a business co-operation contract must pay income tax in accordance with the law.

#### **Article 51**

Enterprises with foreign owned capital and foreign parties to business co-operation contracts have the responsibility to comply with the provisions of the Law on Environmental Protection.

### **Article 52**

Foreign-invested enterprises and business co-operation contracts shall terminate their operation in the following cases:

1. The operation duration inscribed in their investment license expires;
2. According to conditions for operation termination stipulated in contracts, enterprises', charters or agreements made by the parties;
3. by decisions of the agency(ies) in charge of State management over foreign investment due to their serious violation of law or provisions of their investment licenses.
4. They are declared bankrupt.

### **Article 53**

1. Upon the termination of their operation in one of the cases specified at points 1, 2 and 3 of Article 52 of this Law, foreign-invested enterprises and parties to business co-operation contracts shall have to conduct the liquidation of enterprises' assets and liquidation of contracts.
2. In the course of liquidating enterprises' assets, if the enterprises concerned are detected being in the state of bankruptcy, the enterprises' bankruptcy shall be settled according to the procedures prescribed in the law of bankruptcy of enterprises.
3. The settlement of bankruptcy of foreign-invested enterprises shall comply with the provisions of the law on bankruptcy of enterprises.
4. In cases where the Vietnamese party to a joint-venture enterprise has contributed capital with the land use right value, but the enterprise is dissolved or goes bankrupt, the remaining land use right value has contributed as capital shall be part of the enterprise's liquidated assets.

## Chapter V

### STATE MANAGEMENT OF FOREIGN INVESTMENT

#### **Article 54**

The scope of State management of foreign investment includes:

1. Developing strategies, master plans, plans and policies on foreign investment;
2. Promulgating laws and regulation on foreign investment activities.
3. providing guidance to ministries and local authorities with respect to the performance of activities relating to foreign investment.
4. Issuing and revoking investment licenses.
5. Determining the co-ordination between State bodies in relation to managing foreign investment activities.
6. Inspecting, monitoring and supervising foreign investment activities.

#### **Article 55**

The Government shall uniformly carry out State management of foreign investment in Vietnam.

The Government shall prescribe the investment evaluation for granting of investment licenses, the registration for granting investment licenses; base itself on the planning and plans for socio-economic development, and fields, characteristics and scale of investment licensing responsibilities to the People's Committees of the provinces and centrally-run cities; and stipulate the granting of investment licenses to projects for investment in industrial and export processing zones.

#### **Article 56**

The Ministry of Planning and Investment shall be the body in charge of State Management of foreign investment activities in Vietnam.

The Ministry of Planning and Investment shall have the following duties and powers:

1. Preside over the preparation and submission to the Government of strategies and plans to attract foreign investment; draft laws, regulations and policies on foreign investment; co-ordinate with ministries, ministerial level bodies and Government bodies in relation to the State management of foreign investment; provide guidance to people's committees of provinces and cities under central authority on the implementation of laws, regulations and policies on foreign investment.
2. Prepare and co-ordinate list(s) of investment projects; provide guidance on investment procedures; carry out State management of investment promotion and consultancy activities;
3. Receive investment applications and preside over the evaluation of investment projects; issue investment licenses within its authority;
4. Act as co-ordinating body to deal with problems arising during the formation, commencement and implementation of foreign investment projects;
5. Evaluate social and economic effects of foreign investment activities.
6. Inspect and supervise the implementation of foreign investment activities in Vietnam in accordance with the law.

#### **Article 57**

Ministries, ministerial level bodies, and Government bodies shall carry out State management of foreign investment within their authority and in accordance with the following powers and functions:

1. Co-ordinate with the Ministry of Planning and Investment to prepare laws and regulations, policies, master plans and plans relating to foreign investment.
2. Prepare plans and lists of investment projects calling for foreign investment within their respective industries; and organize the promotion and encouragement of investment.
3. Participate in the evaluation of investment projects;
4. Guide and resolve procedures relating to commencement and implementation of investment projects;
5. Inspect and supervise the operations of enterprises with foreign owned capital and parties to business co-operation contracts within their respective scopes of responsibilities.

6. Perform other duties within their authority in accordance with the provisions of the law.

#### **Article 58**

People's committees of provinces and cities under central authority shall carry out State management of foreign investment in their respective localities in accordance with the following powers and functions;

1. On the basis of approved socio-economic development master plans, prepare and publish a list of local projects calling for foreign investment; organize the promotion and encouragement of investment.
2. Participate in the evaluation of foreign investment projects in their respective localities;
3. Receive investment applications, evaluate investment projects and issue investment licenses to foreign investment projects in their localities in accordance with the authority delegated by the Government;
4. Resolve all administrative procedures relating to the formation, commencement and implementation of investment projects within their respective authority;
5. Carry out State management in their localities with respect to business production activities of enterprises with foreign owned capital and parties to business co-operation contracts;
6. Inspect and supervise the operations with foreign owned capital and parties to business co-operation contracts.

#### **Article 59**

The parties or one of the parties or the foreign investors shall submit to the investment licensing agency their dossiers of application for investment licenses according to the Government's regulation.

#### **Article 60**

The investment licensing agency shall examine the applications and notify its decisions to the investors within 45 days for projects subject to the investment evaluation for investment license granting, or 30 days for projects subject to the registration for investment license granting, from the date of receipt of valid dossiers. The approval decision shall be notified in form of an investment license.

The investment license shall be valid as the business registration certificate.

#### **Article 61**

The joint venture contract, the business co-operation contract, the charter of the enterprise, and any changes to the business objectives, the scale of production or the contribution ratio of the legal capital must be approved by the body in charge of State management of foreign investment.

#### **Article 62**

Ministries, ministerial level bodies, Government bodies and people's committees of provinces and cities under central authority shall be responsible for settlement of procedures relating to the implementation of



investment projects within thirty (30) days as from the receipt of proper documents.

### **Article 63**

Enterprises and individuals that have made outstanding achievements in their production and/or business activities, or made great contribution to the cause of national construction and development, shall be commended and/or rewarded according to provisions of law.

Foreign investors, foreign-invested enterprises, parties to business co-operation contracts, organizations and individuals, officials, State employees, and State agencies, that violate the provisions of the legislation on foreign investment shall, depending on the seriousness of their violations, be handled according to law.

### **Article 64**

1. The inspection of operations of enterprises must be conducted strictly according to the prescribed functions, powers and comply with provisions of law.

2. The financial inspection shall not be conducted more than once a year against an enterprise. The extraordinary inspection shall be conducted only when there are grounds to believe that enterprises have broken laws. When conducting the inspection, there must be a decision of the competent person. Upon conducting the inspection, there must be an inspection minutes and conclusion. The head of inspection delegation shall be responsible for the contents of the inspection minutes and conclusion. Those who issue inspection decisions not in accordance with law or take advantage of the inspection to gain personal benefits, harass or cause troubles to the inspected enterprises' operations shall, depending on the seriousness of their violations be disciplined or examined for penal liability. If damage is caused, they shall also have to pay compensation therefore.

3. Foreign investors, foreign-invested enterprises, parties to business co-operation contracts, organizations and individuals may lodge complaints about or initiate lawsuits against decisions and illegal acts of causing difficulties or troubles of State officials, employees or agencies. The complaint lodging and lawsuit institution and the settlement of complaints and lawsuits shall comply with the provisions of law.

## Chapter VI

### IMPLEMENTATION PROVISIONS

### **Article 65**

Pursuant to the provisions of this Law, the Government shall make provisions for hospitals, schools, and research institutes in technological, technical, and natural science to co-operate in foreign investment activities.

### **Article 66**

1. Basing itself on the principles prescribed in this Law, the Government may sign agreements with foreign investors or offer security or guarantee measures.
2. Foreign investment activities in Vietnam must comply with the provisions of this Law and relevant provisions of the Vietnamese law. In cases where matters is not yet prescribed by Vietnamese laws, the parties may agree in the contract upon the application of foreign laws, provided that such foreign law application is not contrary to the basic principles of Vietnamese law.

**Article 67**

This Law shall be of full force and effect as of the date of promulgation.

This Law replaces the Law on Foreign Investment in Vietnam dated 29 December 1987; the Law on Amendment of and Addition to a Number of Articles of the Law on Foreign Investment in Vietnam dated 30 June 1990; and the Law on the Law on Foreign Investment in Vietnam dated 23 December 1992.

**Article 68**

The Government shall make detailed provisions for the implementation of this Law.

*This Law was passed on November 12<sup>th</sup>, 1996 by the IX<sup>th</sup> National Assembly of the Socialist Republic of Vietnam at its 10<sup>th</sup> session.*

**Chairman of the National Assembly**

NONG DUC MANH

# Map of Vietnam



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